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SECOND SERIES

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39 Cal.2d 719

PEOPLE v. KIRKES.

Cr. 5341.

Supreme Court of California, in Bank.
Oct. 17, 1952.

Defendant was convicted in the Superior Court, Santa Barbara County, Ernest D. Wagner, J., of murder in the second degree, and he appealed. The Supreme Court, Edmonds, J., held that prosecuting attorney was guilty of prejudicial misconduct when he stated belief of guilt of defendant based on evidence not introduced at trial, and when he made statements of fact in argument to jury which were not in the record.

Judgment and order denying new trial reversed.

Prior opinion, 243 P.2d 816.

1. Criminal Law 🔑719(3)

Statements by prosecuting attorney, not based upon legitimate inferences from the evidence, to the effect that he has personal knowledge of defendant's guilt and that he would not conduct the prosecution unless he believed the defendant to be guilty constitute misconduct.

2. Criminal Law 🔑919(3)

Where counsel prosecuting murder charge stated in argument to jury that he would not have associated with the prosecution if he had not believed the defendant to be guilty, and that he knew of defendant's guilt prior to the time that he entered the case, latter statement implied knowledge which could not have been based upon inferences from evidence presented, but upon counsel's undisclosed information, and such argument was misconduct requiring new trial.

3. Criminal Law 🔑719(1)

Statements of fact by prosecuting attorney in his argument to jury, when same are not in evidence, constitutes misconduct.

4. Criminal Law 🔑719(1)

In prosecution for murder, wherein it appeared that defendant was not indicted until more than eight years after killing involved, and state's witness had told no one of certain occurrence implicating defendant until after defendant was indicted, argument of prosecuting attorney that witness' long silence was because of her fear for her own safety if she testified against defendant was improper when not supported by any evidence.

5. Criminal Law 🔑1119(4)

Record on appeal must contain both the arguments of prosecution and defense counsel in order to permit Appellate Court to determine whether arguments of prosecution were improper and amounted to misconduct, or were invited by arguments of defense.

6. Criminal Law 🔑726

In prosecution for murder, wherein it was contended that improper remarks of prosecuting attorney were invited by remarks of defense counsel, record established that remarks by defense counsel were permissible inferences or comments upon the evidence.

7. Criminal Law 🔑726

Misconduct of prosecution by statements in argument to jury cannot be justified by assertion that they were in reply to those made by counsel for the defendant, but proper way to correct such an abuse of privilege is for prosecution to call it to the attention of the court and have same terminated.

8. Criminal Law 🔑1037(1, 2)

When prosecuting attorney is guilty of misconduct in trial of criminal case, it is ordinarily duty of defense counsel to promptly call same to attention of court, and assign it as misconduct, or request court to instruct jury to disregard it, but exception exists where comment is of such character that error could not be cured and harmful result would not be obviated by a timely admonition or instruction to the jury, in which event it will be considered by Appellate Court without assignments and requests for instructions.

9. Criminal Law ⚿1037(1, 2)

Where defendant charged with murder had not been indicted until over eight years after the killing, and state's witness had not come forth with certain damaging evidence until after indictment, improper argument of prosecuting attorney, not based on evidence, that unexplained eight years silence was because of witness' fear of her own safety if she testified against defendant was of character not capable of being cured by timely admonitions or instructions to the jury, and request of defense counsel that court admonish the jury to disregard such argument and repeated objections to statements of prosecutor were not prerequisite to consideration of such impropriety by Appellate Court.

10. Criminal Law ⚿1171(1)

Determination whether misconduct of prosecuting attorney has prejudiced substantial rights of defendant rests largely upon facts of each case, and Appellate Court may reverse judgment only when it appears from all facts that there has been a miscarriage of justice.

11. Criminal Law ⚿730(1)

Fact that jury in criminal prosecution was instructed generally to base its verdict exclusively upon the evidence did not present misconduct of prosecutor from being prejudicial and such as to require a reversal.

12. Criminal Law ⚿782(10)

In prosecution for murder, instruction that verdict of guilty would be justified by testimony of a single witness if great weight of all evidence was on side of that witness as opposed to the greater number of witnesses, was improper in that it in effect told jury that it could convict if, from preponderance of evidence, it believed that single fact was established by one witness.

13. Criminal Law ⚿1172(4)

Where it is impossible to determine from the evidence which of conflicting instructions formed basis of verdict reached by jury, the giving of such inconsistent instructions constitutes reversible error.

◆

W. P. Butcher, Canfield & Westwick and John A. Westwick, Santa Barbara, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards and Stanford D. Herlick, Deputy Attys. Gen., David S. Licker, Dist. Atty. and Vern Thomas, Asst. Dist. Atty., Santa Barbara, and Frank J. McCarthy, Deputy Dist. Atty., Santa Ynez, for respondent.

EDMONDS, Justice.

Leonard M. Kirkes was indicted for the murder of Margaret Senteney more than eight years after she was killed. A jury found him guilty of murder of the second degree and he has appealed from the judgment entered upon the verdict and from an order denying his motion for a new trial.

In 1942, Margaret, then 20 years of age, was living in Carpenteria. She left her parents shortly after dinner on a Friday evening to go to the home of a woman who lived about one-quarter of a mile away. On the following Sunday morning, her body was found lying beside a little used road some seven miles from Carpenteria. Death had been caused by strangulation and dislocation of vertebrae of the neck. She had not been sexually molested.

At the time of the homicide, Kirkes, a married man living in Carpenteria with his family, was a member of the State Highway Patrol. All of the evidence upon which the jury found him guilty is circumstantial. The most damaging testimony against him is that of Dorothy Egan who said that she saw Margaret enter and ride away in Kirkes' automobile on the fateful Friday evening. Mrs. Egan told no one of this occurrence until after Kirkes was indicted.

One of the vital elements in the prosecution's case is whether Kirkes' automobile trunk on the night of the crime contained a rubber floor mat capable of making impressions such as were found on the legs of the dead girl. Several witnesses for the defense testified that the mat which had been in the automobile was discarded some time prior to the date of the killing. The only evidence presented by the prosecution in this regard was that of one witness who said that the automobile had such a mat at the time he sold it to Kirkes some months previously. Several other elements in the chain of circumstantial evidence forged by the prosecution also rested upon the testimony of a single witness.

Kirkes does not contend that the evidence is insufficient to sustain the verdict and judgment. He challenges the judgment of conviction upon the ground that the deputy district attorney was guilty of misconduct. He also charges that several instructions given to the jury and certain rulings of the court upon the admission of evidence were prejudicially erroneous.

In his closing argument to the jury, the deputy district attorney said: "As a member of the District Attorney's Office of this County [for 19 consecutive years] I have taken an oath to prosecute cases to the best of my ability. If, during the conduct of this trial I have been—I have appeared to you to have been overly aggressive or tenacious, then I say to you that I was following out that oath, that in all sincerity I believe and I still believe and knew prior to the time that I became associated in this particular prosecution in the month of October, that this particular Defendant was guilty of this particular offense. I would not have been associated with the prosecution of this particular case unless I had so believed."

Commenting upon the testimony of Mrs. Egan, and the efforts of the defense to cast doubt upon it, he remarked: "The Court will instruct you that you have a right to make inferences and deductions from the evidence * * *. You have the right to infer that this girl waited for her own safety until this Defendant was apprehended, until he was indicted by a Grand Jury of this County, until proceedings were had against him, to bring him to justice, before coming forward, because if she had come forward, with the knowledge that that man had of every portion of the evidence in this case, her life wouldn't be worth that."

No objection was made to the quoted statements of the deputy district attorney, nor were special admonitory instructions requested by Kirkes. Nevertheless, the court instructed the jury that it was "to decide this case solely upon the evidence introduced and the inferences which you may deduce therefrom". The jurors were also instructed as follows: "You are cautioned to distinguish carefully between the facts testified to by the witnesses and any statements made by the attorneys or the court during the trial or in the arguments, as to what facts have been proved. If there is any variance between the two, *you must,* in arriving at your verdict * * * consider only the facts testified to by the witnesses. You will also bear in mind that statements made by counsel during the trial or in their arguments are not evidence in the case * * *.

"The only legitimate purpose of argument is to assist you in arriving at a proper verdict from the evidence in the case, applying to such evidence the law as given you by the Court, and the only statements of counsel that are to be taken into consideration by you as establishing any of the facts in issue are such that may have been made during the trial as admissions or stipulations * * *."

The court gave numerous instructions to the effect that Kirkes' guilt must be proved beyond a reasonable doubt, as well as several concerning circumstantial evidence. The jurors were also instructed that they should consider the instructions as a whole. Other instructions dealt with the credibility of witnesses and the weight to be given to testimony. With them the following instruction was given: "The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case, the jury believes that the greater weight of the evidence, considering its reliability and the credibility of the witness, is on the side of the one witness as against the greater number of witnesses."

Kirkes contends that the remarks of the deputy district attorney constitute prejudicial misconduct. He also claims that the last-quoted instruction is confusing, contradictory and prejudicial. In addition, he cites several rulings upon the admissibility of evidence, certain other instructions, and a statement allowing him only one challenge to each of two alternate jurors as being prejudicially erroneous.

The attorney general disputes each of these contentions and argues that the evidence of guilt was overwhelming and conclusive. According to him, the remarks of the deputy district attorney were not prejudicial and were invited by certain statements of Kirkes' counsel in his argument to the jury. The instruction upon the weight to be given the testimony of one witness, he says, was not erroneous, especially when viewed in the light of all the other instructions.

[1, 2] It is well established that statements by the prosecuting attorney, not based upon legitimate inferences from the evidence, to the effect that he has personal knowledge of the defendant's guilt and that he would not conduct the prosecution unless he believed the defendant to be guilty are misconduct. People v. Hidalgo, 78 Cal.App.2d 926, 939, 941–942, 179 P.2d 102; People v. Chilcott, 18 Cal.App.2d 583, 588, 64 P.2d 450; People v. Brown, 81 Cal. App. 226, 241, 253 P. 735. "There can be no excuse for such comment." People v. Podwys, 6 Cal.App.2d 71, 74, 44 P.2d 377, 378. The classic expression of the rule appears in this oft-quoted statement in People v. Edgar, 34 Cal.App. 459, 468, 167 P. 891, 894.

"When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial that the defendant was guilty of the crime charged. People v. Rogers, 163 Cal. 476, 126 P. 143. But his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown, in evidence."

The latter portion of the quotation is especially pertinent here. Not only did the deputy district attorney state his belief in Kirkes' guilt, without which he would not have been associated with the prosecution, he also flatly stated that he knew of Kirkes' guilt "prior to the time" that he entered the case. Such knowledge could not have been based upon inferences from the evidence presented. In effect, the prosecutor, who had just laid a foundation by showing his own excellent character and long years of public service, was testifying to the ultimate fact in issue without disclosing the source of his information. Such eminently unfair conduct cannot be condoned.

[3, 4] Equally well-settled is the rule that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct. People v. Evans, 39 Cal.2d 242, 246 P.2d 636; People v. Henderson, 4 Cal.2d 188, 192–193, 48 P.2d 17; People v. Cook, 148 Cal. 334, 349–350, 83 P. 43. Here, the deputy district attorney excused Mrs. Egan's long silence by her asserted fear

for her own safety if she testified against Kirkes. There is no evidence whatever upon which to base that statement. To picture Kirkes as a murderer who would kill again to cover his crime and so bold that he had threatened those who might testify against him was entirely unjustified.

These instances of misconduct make it unnecessary to examine in detail other inflammatory appeals to passion and prejudice in the closing argument. Without deciding whether they constitute further instances of misconduct, it fairly may be said that they add to the overall unfairness of the argument.

[5] The attorney general argues that, even if the deputy district attorney would otherwise be guilty of misconduct, his remarks were invited by the argument of counsel for Kirkes and thus excusable. For the proposition that comments in reply to charges by opposing counsel do not constitute misconduct, reliance is placed upon a series of decisions holding that the reviewing court is unable to appraise the effect of criticized remarks when the record on appeal does not contain the arguments of counsel for each side. People v. Gingell, 211 Cal. 532, 540, 296 P. 70; People v. Hidalgo, supra, 78 Cal.App.2d at page 940, 179 P.2d 102; People v. Rinesmith, 40 Cal.App.2d 786, 792, 105 P.2d 1021; People v. Chilcott, supra, 18 Cal. App.2d at pages 586–587, 64 P.2d 450; People v. Passintino, 94 Cal.App. 341, 342–343, 271 P. 205. The rule of these cases clearly is inapplicable here, the entire argument of each counsel being included in the record on appeal. In this case, the appellate court can determine both whether the remarks were invited and whether, under the circumstances, they constitute misconduct.

[6] Two other decisions upon which the attorney general relies hold that the prosecution may reply to an erroneous assertion of fact made by defense counsel in his argument, provided his answer to the challenge is fair. People v. Perkin, 87 Cal. App.2d 365, 368, 197 P.2d 39; People v. Dutro, 75 Cal.App. 138, 144–145, 242 P. 84. These cases are likewise distinguishable from the present situation, there being no erroneous statement of fact by counsel for Kirkes to be countered. All of the remarks by Kirkes' attorney were permissible inferences from or comments upon the evidence. People v. Knight, 44 Cal. App.2d 887, 895, 113 P.2d 226, does not sustain the position taken by the attorney general. It merely mentions in passing that certain instances of alleged misconduct resulted from statements made by defense counsel and that they were not sufficient to justify a reversal of the judgment.

[7] The rule here applicable was stated most recently in People v. Sampsell, 34 Cal.2d 757, 765, 214 P.2d 813. The court there held that misconduct cannot be justified even though the district attorney's remarks may be in reply to those made by counsel for the defendant. In response to this excuse for misconduct, it has been said: "Assuming that the comments of the district attorney were not warranted by the evidence, his act would not be justified by the fact that defendant's counsel had already committed a like impropriety. The proper way to correct such an abuse of privilege on the part of either counsel is for his adversary to call it to the attention of the court, and have it stopped." People v. Kramer, 117 Cal. 647, 650, 49 P. 842; People v. Cook, supra, 148 Cal. at page 349, 83 P. 43.

The remarks of the deputy district attorney were most reprehensible. In addition, there is nothing in the argument by counsel for Kirkes which in any manner invited them. Remarks upon Mrs. Egan's unexplained eight year silence were not an excuse for the statement of a highly damaging fact concerning which there was absolutely no evidence.

[8, 9] Nevertheless, the atttorney general contends that Kirkes cannot now be heard to complain of misconduct because he did not object to the statements when they were made, nor did he request the court to admonish the jury to disregard the objectionable argument. This argu-

ment is based upon the general rule "that when a district attorney is guilty of misconduct in the trial of a criminal case, it is ordinarily the duty of counsel for the defense promptly to call the attention of the court thereto and assign it as misconduct, or request the court to instruct the jury to disregard it. Such assignments and requests are necessary as a foundation for a complaint to this court." People v. Sieber, 201 Cal. 341, 356, 257 P. 64, 71; People v. Meichtry, 37 Cal.2d 385, 390, 231 P.2d 847; People v. West, 215 Cal. 87, 96, 8 P.2d 463, 466; People v. Nakis, 184 Cal. 105, 116, 193 P. 92.

"There is an exception to this well-recognized rule in cases where the comment is of such a character that the error could not be cured and the harmful result would not be obviated by a timely admonition or instruction to the jury." People v. West, supra; People v. Sampsell, supra, 34 Cal.2d at page 764, 214 P.2d 813; People v. MacDonald, 167 Cal. 545, 551, 140 P. 256; People v. Ford, 89 Cal.App.2d 467, 471, 200 P.2d 867; People v. Hidalgo, supra, 78 Cal.App.2d at page 942, 179 P.2d 102; People v. Simon, 80 Cal.App. 675, 679, 252 P. 758. Under the circumstances disclosed by this record, the objectionable remarks fall within the exception rather than the rule. They were of a type which repeatedly has been condemned as flagrant misconduct. Rather than consisting of a single statement interjected in the heat of debate, they were interspersed throughout the closing argument in such manner that their cumulative effect was devastating. Repeated objections might well have served to impress upon the jury the damaging force of the challenged assertions. A series of admonitions to the jury could not have cured the harmful effect of such misconduct.

[10] "Whether the misconduct of a prosecuting attorney has prejudiced the substantial rights of a defendant must rest largely upon the facts of each case. An appellate court may only reverse the judgment when it appears from all the facts that there has been a miscarriage of justice. Const. Sec. 4½, Art. VI. Obviously, conduct of a prosecutor which would amount to prejudicial misconduct in one case might not result in a miscarriage of justice in another case. In other words, there is no definite rule by which asserted misconduct may be measured for the purpose of determining whether it prevented the defendant from having that fair and impartial trial which the law requires for every person charged with a crime." People v. Braun, 14 Cal.2d 1, 7, 92 P.2d 402, 405.

Here the evidence is entirely circumstantial and conflicting. In important elements the prosecution's case depends upon the testimony of a single witness. The attorney general argues that the evidence is overwhelming and leads unmistakably to a conclusion of guilt. It is not weakened, he says, by the fact that it is circumstantial.

[11] "Circumstantial evidence is as adequate to convict as direct evidence." People v. Reed, 38 Cal.2d 423, 431, 240 P. 2d 590, 595; People v. Koenig, 29 Cal.2d 87, 91, 173 P.2d 1; People v. Hills, 30 Cal. 2d 694, 700, 185 P.2d 11. However, although it is sufficient in this case to sustain the judgment, the evidence does not point unerringly to Kirkes' guilt. The jury, in weighing the evidence presented by the prosecution against the directly conflicting evidence offered by Kirkes, must have found the scales of justice somewhat evenly balanced. Under such circumstances, the improper information that the deputy district attorney had personal knowledge of Kirkes' guilt, added to the unproven fact that a key witness had been placed in fear for her life, undoubtedly weighed heavily against Kirkes and well may have been the deciding factors which brought about his conviction. The misconduct of the deputy district attorney, therefore, resulted in a miscarriage of justice entitling Kirkes to a reversal of the judgment. People v. Braun, supra, 14 Cal.2d at page 8, 92 P.2d 402. That the jury was instructed generally to base its verdict exclusively upon the evidence does not prevent the misconduct from being prejudicial and requiring a reversal. People v. Berryman, 6 Cal.2d 331, 337, 57 P.2d 136; People v. Fleming, 166 Cal. 357, 381, 136 P. 291.

This conclusion makes it unnecessary to consider Kirkes claim of error in the instruction concerning the weight to be given the testimony of one witness except as it may constitute an additional ground for reversal of the judgment. The attorney general argues that the instruction is not erroneous, especially when read with the numerous correct instructions upon reasonable doubt. It deals only with the credibility of witnesses, he says, rather than with the burden of proof.

[12] However, the instruction clearly transcends the bounds of one limited to the credibility of witnesses. It informed the jury that a verdict would be justified by the testimony of a single witness if the greater weight of all of the evidence was on the side of that witness as opposed to the greater number of witnesses. The result, in effect, was to tell the jury that it could convict if, from a preponderance of the evidence, it believed that a single fact was established by one witness.

A similar instruction was condemned in Long v. Standard Oil Co., 92 Cal.App.2d 455, 462, 207 P.2d 837, 841, the court saying: "The words 'would justify a verdict in accordance with such testimony' have no proper place in a statement of the rule. As defendant correctly says, proof of a single fact would not warrant a verdict unless it was the sole determinative fact in the case." However, under the circumstances of that civil case, in which the weight of the evidence was not questioned, the court held that the error was not prejudicial. But here the error must be related to a series of disputed facts, many of them resting upon the testimony of a single witness, which constituted the prosecution's chain of circumstantial evidence. No single fact in the chain is determinative.

This error must be considered in connection with the additional misstatement in the instruction that the determinative fact may be established simply by the greater weight of the evidence. Language similar to that here used has been held to be an incorrect statement of the law applicable in criminal cases. People v. Ames, 61 Cal.App.2d 522, 534, 143 P.2d 92. In the Ames case, however, the error appeared in one paragraph of a seven page instruction, two and one-half pages of which were devoted to a correct statement of the doctrine of reasonable doubt. In addition, no consideration was given to the erroneous statement that proof of a single fact would warrant a verdict. Under those circumstances, the error was found not to be prejudicial.

[13] When the combined errors in this instruction are related to the circumstances disclosed by this record, it becomes obvious that an irreconcilable conflict exists between the challenged instruction and the proper instructions upon circumstantial evidence and reasonable doubt. It is impossible to determine from the evidence which of the conflicting instructions formed the basis of the verdict reached by the jury. Under such circumstances, inconsistent instructions may constitute reversible error. People v. Cornett, 33 Cal.2d 33, 41, 198 P.2d 877. Considering the entire record in this case, the inconsistent instructions, together with the misconduct of the deputy district attorney, clearly have brought about a miscarriage of justice.

The judgment and the order denying a new trial are reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

39 Cal.2d 781

DUPREY v. SHANE et al.

S. F. 18614.

Supreme Court of California, in Bank.
Oct. 24, 1952.

Action for malpractice. The Superior Court, San Francisco County, Melvyn I. Cronin, J., entered judgment for plaintiff, and defendants appealed. The Supreme Court held that where employee of chiropractor was injured in course and scope of employment and chiropractor was guilty of alleged malpractice in subsequent treatment of the injury, aggravating the injury, employee could maintain malpractice action against chiropractor, though Industrial Accident Commission had awarded employee compensation.

Affirmed.

Prior opinion, 241 P.2d 78.

1. Appeal and Error 🔑1002

Conflicts in testimony are for the jury.

2. Workmen's Compensation 🔑2253

Where physician's employee is injured in course and scope of employment and employing physician elects to treat the industrial injury, obligations growing out of employer-employee relationship terminate, and physician assumes same responsibilities that any physician would have assumed, and if physician's negligent treatment aggravates original injury, employee may sue physician-employer for malpractice, notwithstanding that Industrial Accident Commission has awarded compensation for the injury. Labor Code, § 3852.

3. Workmen's Compensation 🔑2084

Where employer is insured and employee suffers injury in course and scope of employment, employee's remedy before Industrial Accident Commission is the exclusive remedy against the employer for the injury. Labor Code, §§ 3600, 3601.

4. Workmen's Compensation 🔑1791

The finding of Industrial Accident Commission that employee has suffered an injury compensable under the Workmen's Compensation Act is res judicata on that issue as against employer.

5. Workmen's Compensation 🔑957

The rule that when a person is injured by a tortious act, and such injury is aggravated by negligence of attending physician, such aggravation of the injury is within scope of risk created by original tortious act, applies to workmen's compensation cases. Labor Code, § 3201 et seq.

6. Workmen's Compensation 🔑1178

Where employee is injured in industrial accident, and original injury is aggravated by negligence of attending physician, and employee seeks recovery for original injury and for its aggravation from his employer or from insurance carrier, Industrial Accident Commission has exclusive jurisdiction to determine claim against employer or insurance carrier.

7. Workmen's Compensation 🔑957, 1177, 2253

Where an employee is injured in industrial accident and attending physician retained by insurance carrier is negligent and causes a new injury, employee may not only sue employer before Industrial Accident Commission, but may also sue physician for malpractice, and the Commission has no jurisdiction of the malpractice action.

8. Workmen's Compensation 🔑2253

Attending physician who negligently treats employee injured in industrial accident and produces new injury is "person other than employer" within Labor Code provision that claim of employee for compensation does not affect his right of action for damages proximately resulting from such injury against any "person other than the employer". Labor Code, § 3852.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Other than Employer".

9. Workmen's Compensation 🔑1177, 2253

If employee of physician goes to such physician for treatment of nonindustrial injury, and physician is negligent, employee may sue physician for malpractice, and the Industrial Accident Commission has no jurisdiction of such action.

10. Workmen's Compensation ⚷2253

Where practical nurse employed by chiropractor was injured in course and scope of employment and chiropractor allegedly negligently treated injury and injury was thereby aggravated, even though Industrial Accident Commission awarded compensation, nurse could maintain malpractice action against chiropractor. Labor Code, § 3852.

11. Master and Servant ⚷92(1)
Physicians and Surgeons ⚷12

Where employee of chiropractor was injured in course of her employment and employer negligently treated employee producing further injuries, and employee brought malpractice action, rule that law is opposed to dual legal personalities was not applicable, since there existed both the relationship of employer-employee and that of doctor and patient. Labor Code, § 3852.

12. Workmen's Compensation ⚷2088

Court will not extend operation of defensive provisions of Workmen's Compensation Act to bar actions to recover for liabilities which, although they may be in some indirect way connected with employer-employe relationship, do not arise out of, or depend upon it, and are not expressly included within terms of the act.

13. Physicians and Surgeons ⚷18(8)

In malpractice action against one chiropractor and another chiropractor, employed by first chiropractor, evidence was sufficient to support implied finding of jury that both chiropractors negligently treated plaintiff to her injury.

14. Physicians and Surgeons ⚷16, 18(6)

If two chiropractors, who were alleged to have negligently treated plaintiff, were joint tort-feasors, both would be liable for full damage to plaintiff, at least in absence of evidence to show facts upon which an apportionment could have been made, and burden of producing such evidence was on chiropractors.

15. Appeal and Error ⚷930(4)

Where one medical bill of plaintiff was for $1,220.59 and another medical bill of plaintiff, which was paid by compensation carrier of one of the defendants, was $2,351.81 and jury returned verdict for plaintiff for $19,572.40, the Supreme Court would assume, in view of the odd amount of the judgment, that jury included the medical bill of $2,351.81 in its verdict.

16. Workmen's Compensation ⚷2254

Where employee of chiropractor received an injury in course of her employment, and thereafter chiropractor was allegedly guilty of malpractice in treatment of employee, causing her further injury, and compensation carrier for chiropractor paid one of employee's medical bills, and employee brought malpractice action against chiropractor, it was proper for judgment against chiropractor to include amount of medical bill paid by chiropractor's compensation carrier, and chiropractor's employee was statutory trustee of that portion of the recovery for compensation carrier. Labor Code, §§ 3850–3862.

17. Workmen's Compensation ⚷2252

Lien which may be filed by employer or his insurance carrier in action by employee against third person who proximately contributed to industrial injury, may be filed at any time before satisfaction of judgment. Labor Code, §§ 3850–3862.

18. Workmen's Compensation ⚷2254

Though, as between employee and employer and employer's compensation carrier, malpractice of employer in treating employee is compensable, in so far as injury is due to malpractice and not due to original industrial injury, carrier can recover from employer those portions of amounts paid by carrier to employee that are due to malpractice. Labor Code, §§ 3850–3862.

◆

Newell J. Hooey, Robert L. Lamb and Herbert Chamberlain, San Francisco, for appellants.

Paul I. Myers, San Francisco, for respondent.

Partridge & O'Connell and Wallace O'Connell, San Francisco, as amici curiae on behalf of respondent.

PER CURIAM.

In this malpractice action defendants appeal from a judgment entered on a jury verdict in plaintiff's favor. Defendants' chief contention is that because plaintiff was an employe of defendants Shane at the time she was injured, she may not recover damages in this action at law but may only receive compensation in a proceeding before the Industrial Accident Commission under the workmen's compensation laws of this State. See Labor Code, § 3601.[1] A hearing was granted by this court, after decision by the District Court of Appeal, First Appellate District, Division One, for the purpose of giving further study to the problems presented. After such study we have concluded that the opinion of the District Court of Appeal, prepared by Presiding Justice Peters, affirming the judgment, correctly treats and disposes of the issues involved, and it is therefore adopted as and for the opinion of this court. Such opinion (with appropriate deletions and addita as indicated) is as follows:

"* * * The cast of characters involved in this legal drama are:

"Iva Mae Duprey, the plaintiff and respondent, employed as a practical nurse by The Shane Diagnostic Foundation;

"The Shane Diagnostic Foundation, a partnership engaged in the practice of chiropractic, a defendant and appellant;

"Dr. Raymond Shane and his wife Helen, defendants and appellants, who are partners doing business under the name of The Shane Diagnostic Foundation;

"Dr. John J. Harrison, a defendant and appellant, who is a chiropractor employed by The Shane Diagnostic Foundation during the period here involved.

"This is a malpractice action brought by Duprey against The Shane Diagnostic Foundation, the two Shanes, and Dr. Harrison. The basic theory of the suit is that on December 8, 1947, the * * * [plaintiff] received injuries to her neck and body while working at her employment; that thereafter she was treated by her fellow employee Dr. Harrison, and by her employer, Dr. Shane; that such treatments were negligently administered, resulting in a new and further disability, for which damages are sought. The basic defense on this appeal is that the superior court had no jurisdiction of the * * * [defendants], or of the subject matter of the action, because, so it is claimed, the injury arose in the course and scope of the employment, and the Industrial Accident Commission has exclusive jurisdiction. Admittedly, the commission has made an award to * * * [plaintiff], and it is claimed that this award is res judicata of all of the issues in this action. The trial court overruled demurrers, objections to the introduction of evidence, motions for nonsuit and for a directed verdict and other motions, all raising this basic question of jurisdiction. The jury brought in a verdict for $19,572.40 against the * * * [defendants] above named, judgment was entered on this verdict, and a motion for a new trial denied.

"On this appeal * * * [defendants] make three basic contentions:

"(1) That the Industrial Accident Commission has exclusive jurisdiction over all of the injuries sustained by * * * [plaintiff], and its decision is res judicata of all of the issues involved herein;

"(2) That, as a matter of law, the evidence is insufficient to sustain the judgment against Dr. Harrison. The other defendants do not urge the insufficiency of the evidence to show negligence;

"(3) That the judgment is demonstrably excessive in the amount of $2,351.81.

"The Facts Most Favorable to * * * [Plaintiff]

"It was stipulated that Helen and Dr. Shane were partners doing business as The Shane Diagnostic Foundation; that Dr. Harrison was employed as a chiropractor by this partnership and was such during the week of December 8 to 15, 1947; that * * * [plaintiff] was an employee of the partnership on December 8, 1947, and that she was paid her wages for the week of December 8th to the 15th, and tried to work during that period.

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[1] Section 3601: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706 [not here involved], the exclusive remedy against the employer for the injury or death."

"On December 8, 1947, it is admitted that * * * [plaintiff] was injured in an accident arising out of her employment. On that day, as a practical nurse and in the course and scope of her duties, she was giving therapy to a patient. The patient, in moving around in the course of the treatment, started to roll off the treatment table. * * * [Plaintiff], who was standing on the opposite side of the table from which the patient was falling, grabbed the patient in order to break the fall. The patient grabbed * * * [plaintiff] by her hands and the lower part of her arms, and thus the patient was eased to the floor. The * * * [plaintiff] was pulled across the table with a 'terrific yank' to her shoulder. No injury to her neck was then received, according to * * * [plaintiff].

"A short time after this incident * * * [plaintiff] began to suffer pain in her right arm and shoulder, and her head began to ache. She spoke to Dr. Harrison about her pains, and, according to her testimony, he told her that headaches were his specialty and to come into his office and he would fix it up. This all occurred on the afternoon of December 8th. Dr. Harrison gave her what is referred to as a 'Palmer adjustment,' that is, the application of pressure to the neck while the patient is reclining. * * * [Plaintiff] testified that this treatment was suggested by Dr. Harrison and consented to by her, and that Dr. Harrison gave her this same treatment several times that afternoon, after asking [* * *] [plaintiff] if she were better, and receiving a negative reply.

"Dr. Harrison's testimony is not very satisfactory. He stated that he gave * * * [plaintiff] a treatment during the morning of December 8th, but he also testified that he 'palpated' her back, spine and neck after the accident, on 'some' afternoon, and made an examination. On this examination, he stated, he discovered an area of tenderness, normal spastic tissue found in cases of pain, and a soreness and stiffness of the cervical area. He testified that he did not then manipulate or adjust * * * [plaintiff's] spine or neck, although he also testified that he 'manipulated her or adjusted her.' At any rate, it is admitted that Dr. Harrison did not then or thereafter have any X-rays made, nor did he make a fluoroscopic examination.

"* * * [Plaintiff] testified that on December 9th, 10th, 11th and 12th Dr. Harrison gave her several chiropractic adjustments and manipulations each day, similar to the treatments of December 8th, that considerable pressure was applied each time, and that such treatments were very painful. Dr. Harrison could not remember giving * * * [plaintiff] any treatments on these days. * * * [Plaintiff] also testified that the pain increased with each adjustment, that a completely new pain developed in her neck, that she suffered terrible headaches, and that her head began to fall to one side. Other doctors in the office looked at her through a fluoroscope on December 12th, but no X-rays were taken.

"* * * [Plaintiff] testified that she was treated during part of this period by Dr. Shane. She testified that on December 10th, Dr. Shane gave her a 'quick cervical'—a twisting and jerking of the head in the effort to try and snap in anything out of place. Similar treatment was given to her by Dr. Shane on December 11th. No X-rays were taken by Dr. Shane.

"Dr. Shane denied that he gave * * * [plaintiff] any chiropractic treatments on the days here involved, but testified that he examined her cervical spine on December 12th, but did not then examine the back of her head or her right shoulder. It was his testimony that * * * [plaintiff's] head was rigid but erect, and that he could not then make a good examination because of the pain. Dr. Harrison, too, claimed that the reason he had not treated * * * [plaintiff] was because of the pain spasm then present. This, he contended, prevented him from ascertaining the nature of the difficulty, although at another place he testified that his examination revealed a 'subluxation of the fourth cervical vertebra,' which means that that vertebra was out of place. Dr. Harrison testified that such condition requires an adjustment, but that such cannot be done when there is spastic tissue present. Heat and other forms of therapy will relieve the spastic condition. X-rays were not taken by him because he did not believe that the condition he found required them, and he had no cause to suspect a fracture.

"Dr. Shane, who was not particularly active in treating patients ,testified that a vertebral fracture could be identified by palpation—finger pressure—but that to ascertain the type and degree, X-rays would be necessary. He thought that it would be bad practice for a chiropractor to treat a fracture.

"By December 12th, according to * * * [plaintiff], she could not hold up her head, the entire right side of her body was very painful, and she could hardly use her right arm or walk. On December 13th—a Saturday—she told several of the doctors at her place of employment that she could not stand the pain any longer and believed that X-rays should be taken, and she had X-rays taken that day. Her condition became worse over the week end, and on Monday, December 15th, she consulted a * * * physician and surgeon, Dr. Karfiol. This doctor took more X-rays which showed a partial dislocation of the fourth cervical vertebra. He hospitalized * * * [plaintiff] on December 18th and kept her in traction for about two weeks, which made the dislocation no longer visible.

"This physician testified that he applied traction rather than manipulation because he does not manipulate spines if there is an anatomical injury, that is, a disorder discoverable by X-rays or touch, because manipulation in such cases could be dangerous and cause nerve injuries. Dr. Karfiol's diagnosis of a subluxation was confirmed by Dr. Williams, an X-ray specialist, called in by Dr. Karfiol. A Dr. Brown, physician, examined the X-rays taken up to this point and could find no evidence of a dislocation.

"In February of 1948 * * * [plaintiff] consulted Dr. Anderson. He hospitalized * * * [plaintiff] for about six or seven weeks, applied a Thomas collar to her neck, later a steel brace, and gave her therapy treatments until early 1949. Dr. Anderson testified as to the subluxation of the vertebra. When asked if he had formed an opinion as to the probable cause of her condition, he replied that he had reported to an insurance company that it was his opinion that 'as a result of the above described injury, or, as is more likely, the vigorous manipulation subsequent to injury, the patient has a subluxation of her neck at the level of the cervical four on five.' As late as March of 1950 this doctor ascertained that * * * [plaintiff's] posture was still poor, her right shoulder was carried considerably lower than the left, she leaned towards the left and her head was tilted in that direction, turning to the right was restricted 60 per cent, and the other side about 50 per cent. X-rays taken at this time showed that the vertebrae were about normal. Dr. Anderson found no evidence of fracture. He was of the opinion that there was no causal relation between the original injury suffered on December 8, 1947, and the injury which she exhibited while he was caring for her, and he was further of the opinion that 'it is highly possible and probable that the conditions that were found * * * could have been caused by the manipulations described.' The doctor also gave it as his opinion that 'it seems probable that the partial dislocation occurred as a result of the manipulations,' and that the epidural bleeding and scarring of the spinal cord shown to exist could have been caused by the manipulations and adjustments of the spine. Counsel for * * * [plaintiff] made a prolonged attempt to get an opinion from the doctor as to whether manipulation of the patient under the circumstances was or was not bad practice, and the doctor finally stated that manipulation without further diagnosis was bad practice.

"A Dr. Garol, a physician and surgeon, examined * * * [plaintiff] in March of 1950. After describing his method of examination and his findings, he concluded that there was extensive scarring of the spinal cord and that respondent had a fractured vertebra. He was definitely of the opinion that the accident of December 8, 1947, could not have caused the dislocation and fracture he later found.

[1] "Some of this testimony was contradicted by testimony produced by * * * [defendants], but that conflict was for the jury.

"* * * [plaintiff] applied for, and received, an award of compensation from the Industrial Accident Commission. The commission found that on December 8, 1947, * * * [plaintiff] sustained injury arising out of and occurring in the course of her employment 'consisting of a cervical strain,' and that such injury had caused temporary total disability from December 12, 1947, to January 11, 1949, and an appropriate award was made for that period and thereafter 'until the termination of disability.'

"The Jurisdictional Question

[2] "The basic arguments of * * * [defendants] are that the commission had exclusive jurisdiction over all the injuries incurred by * * * [plaintiff], and that its decision is res judicata of the issues in this civil action. The question involved can be stated as follows: Where an employee of a doctor is injured in the course and scope of the employment, and the insured employer treats the industrial injury, and does so negligently, proximately causing a new and further injury and disability, may the employee sue the employer-doctor for malpractice, or has the commission exclusive jurisdiction? It is our conclusion that, when the employing doctor elected to treat the industrial injury, * * * the doctor assumed the same responsibilities that any doctor would have assumed had he been called in on the case. As will be pointed out, such third party doctor can be sued for malpractice resulting in an aggravation of an industrial injury, or a new injury. It follows that the employer-doctor may be sued for malpractice when he elects to treat the industrial injury.

[3–6] "There can be no doubt, of course, that, so far as the original injury of December 8, 1947, is concerned, the employer being insured, the remedy before the commission is 'the exclusive remedy against the employer for the injury.' Lab.Code, § 3601; see, also, Lab.Code, § 3600; Baugh v. Rogers [1944], 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043; Popejoy v. Hannon [1951], 37 Cal.2d 159, 231 P.2d 484. It is also true that the finding of the commission that * * * [plaintiff] suffered an injury on December 8, 1947, compensable under the Workmen's Compensation Act is res judicata on that issue as against the employer. Goodman Bros., Inc., v. Superior Court [1942], 51 Cal.App.2d 297, 124 P.2d 644; [cf. Rideaux v. Torgrimson (1939), 12 Cal.2d 633, 638, 86 P.2d 826]. It is equally true, and admitted by all here concerned, that, in tort cases generally, when a person is injured by a tortious act and this injury is aggravated by the negligence of the attending physician, such aggravation of the injury is within the scope of the risk created by the original tortious act. Dodds v. Stellar [1947], 30 Cal.2d 496, 183 P.2d 658; Heaton v. Kerlan [1946], 27 Cal.2d 716, 166 P.2d 857. This rule applies to workmen's compensation cases. Thus, it is clear that, where an employee is injured in an industrial accident, and this original injury is aggravated by the negligence of the attending physician, and the employee seeks recovery for the original injury and for the aggravation from his employer or from his insurance carrier, the Industrial Accident Commission has exclusive jurisdiction to determine this claim against the employer or his carrier. Smith v. Coleman [1941], 46 Cal.App.2d 507, 116 P.2d 133. As to these principles, there is no serious disagreement between the parties.

[7, 8] "It seems equally clear that, when an employee is injured in an industrial accident, and the attending physician retained by the insurance carrier is negligent and causes a new injury, the employee may not only sue the employer [or the carrier] before the commission, but may also sue the doctor for malpractice. The commission has no jurisdiction of that action against the doctor. This result is reached on the theory that a doctor in such cases is a 'person other than the employer' within the meaning of section 3852 of the Labor Code which provides, in part, as follows: 'The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other

than the employer.' The same section gives the employer the right to sue such third person for reimbursement for expenses incurred by him.

"The proper principle is stated as follows in Hanna 'Industrial Accident Commission Practice and Procedure' at page 103: 'The commission lacks jurisdiction over any action for damages by an employee against a physician on account of alleged malpractice in the treatment of an industrial injury. It may grant increased indemnity or additional treatment to the employee when necessitated by mal-treatment on the part of the attending physician, such increased benefits being a part of the employer's liability. But when the employee chooses to seek damages from the doctor directly, jurisdiction is vested in the civil courts, as it is in all actions for negligence.' See, also, Horovitz 'Workmen's Compensation,' p. 141, and p. 351, fn. 83.

"One of the first cases in this state so holding is Smith v. Golden State Hospital [1931], 111 Cal.App. 667, 296 P. 127. That case not only directly held that an action lies in the civil courts against an attending physician by an employee injured by reason of the negligence of the insurance doctor in attending an industrial injury, but also suggested, by dicta, that the employee could not recover from the employer in a compensation case for such aggravation of the injury. As to the first point, which was the only point directly involved in the case, the appellate court, after a review of the authorities, stated, 111 Cal.App. at page 672, 296 P. at page 129: 'That independent professions by the fact of business contact with the employer should be absolved of responsibility for mistake, avoidable or unjustified neglect resulting in secondary affliction, seems obnoxious to the purpose and spirit of such a statute. To so hold might induce industry to encourage quackery, and place a premium upon negligence, inefficiency and wanton disregard of the professional obligations of medical departments of industry, toward the artisan.' The rule of this case, insofar as it held that the injured employee may sue the attending doctor in a malpractice case, has been consistently approved and followed in this state. Cumming v. Auriemma [1935], 7 Cal.App.2d 208, 210, 46 P.2d 209; Steiner v. Goodyear T[ire] & R[ubber] Co. [1931], 115 Cal.App. 162, 164, 300 P. 980; Fitzpatrick v. Fidelity & Casualty Co. [1935], 7 Cal.2d 230, 234, 60 P.2d 276; Smith v. Coleman [1941, supra], 46 Cal.App.2d 507, 513, 116 P.2d 133; Heaton v. Kerlan [1946, supra], 27 Cal.2d 716, 723, 166 P.2d 857. There are cases in other states that have adopted a contrary view, but California has consistently followed the rule as stated. For general annotations on the subject see 82 A.L.R. 932; 139 A.L.R. 1010.

"It is true that in Heaton v. Kerlan [1946, supra], 27 Cal.2d 716, 166 P.2d 857, the dicta contained in the Golden State Hospital case to the effect that the employee could not recover against the insurance carrier in an action before the commission for the aggravation of the original industrial injury caused by malpractice of the attending physician was disapproved. The precise language of the court is, 27 Cal.2d at page 721, 166 P.2d at page 860: 'Language in that case that negligence in the treatment of an injury is not within the scope of the risk created by the injury * * * is disapproved.' But the court expressly recognized, and its decision is predicated upon the theory, that the employee may sue the attending doctor for malpractice in a civil action—see discussion 27 Cal.2d at pages 722–723, 166 P.2d 857, 860. One of the cases several times expressly approved in the Heaton case is Fitzpatrick v. Fidelity & Casualty Co. [1935, supra], 7 Cal.2d 230, at page 234, 60 P.2d 276, at page 278, where it is stated: 'It is well settled, of course, that a doctor is liable for his own acts and an award to an employee or his dependents against the employer or his insurance carrier does not raise a bar to an action against the doctor for negligence or malpractice.' See, also, Dodds v. Stellar [1947, supra], 30 Cal.2d 496, 183 P.2d 658.

"Thus, it must be accepted as established in this state that an employee injured in an industrial accident may recover in a civil suit against an insurance doctor who aggravates the original injury by negligent treatment, even though the employee has secured an award from the commission against the employer for injury.

[9] "It is equally clear, of course, that, if an employee of a doctor goes to that doctor for treatment of a nonindustrial injury, and the doctor is guilty of negligence, the employee may sue his employer for malpractice. That is obvious, because, of course, the commission would have no jurisdiction of such an action.

[10] "So far, the principles stated are reasonably clear. * * * [Defendants] claim, however, that the rule that the employee injured in an industrial accident can sue the attending physician for malpractice only applies when the doctor is a third person, and has no application where the attending physician is also the employer. There seems to be no authority directly in point on this question, but on principle and logic it would seem that it should make no difference to the liability of the doctor for malpractice whether the attending doctor is the employer or an insurance doctor. This fact should not affect the legal rights of the employee. Dr. Shane, it is true, was the employer of * * * [plaintiff]. As an employer it was his duty to secure compensation for his employee. That he did. As an employer he was under no obligation [under the circumstances shown here] to treat * * * [plaintiff] personally. Had he sent * * * [plaintiff] to the insurance doctor and had that doctor been negligent in treating the industrial injury, that doctor would have been liable for malpractice. There seems to be no logical reason why the employer-doctor, when he undertakes to treat the industrial injury, should not be responsible in a civil action for his negligent acts in treating that injury. Once it is established that an action before the commission for the industrial injury is no bar to an action against the insurance doctor for malpractice, it would seem to follow that the employee does not lose his right to such an action simply because the employer who happens to be a doctor treats the injury. In such event, the employer-doctor is a 'person other than the employer' within the meaning of section 3852 of the Labor Code above quoted. In treating the injury Dr. Shane did not do so because of the employer-employee relationship, but did so as an attending doctor, and his relationship to * * * [plaintiff] was that of doctor and patient.

[11] "* * * [Defendants] say that such a result can be reached only on the theory that Dr. Shane had a dual legal personality—that is, Dr. Shane the employer, and Dr. Shane the doctor, and contend that the law frowns upon the creation of such dual legal personalities, citing such cases as Walker v. City & County of San Francisco [1950], 97 Cal.App.2d 901, 219 P.2d 487, and Park v. Union Mfg. Co. [1941], 45 Cal.App.2d 401, 114 P.2d 373. It is true that the law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved—Dr. Shane—bore towards his employee two relationships—that of employer and that of a doctor—there should be no hesitancy in recognizing this fact as a fact. Such a conclusion, in this case, is in precise accord with the facts and is realistic and not legalistic. We conclude, therefore, that an employee injured in an industrial accident may sue the attending physician for malpractice if the original injury is aggravated as a result of the doctor's negligence, and that such right exists whether the attending doctor is the insurance doctor or the employer.

[12] [This conclusion finds support, by analogy, in Baugh v. Rogers (1944), supra, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043. It was there held that the provisions of the Labor Code, although effectual as a defense to bar recovery by the employe from the employer (except, of course, for compensation through Industrial Accident Commission proceedings), did not operate to preclude recovery from the employer by the owner of a motor vehicle for liability imposed on the latter by section 402(a) of the Vehicle Code arising out of the employer's negligent operation of the motor vehicle to the damage of his employe. The facts were that the owner of the car permitted the plaintiff's employer to drive the

vehicle; the employer negligently operated the car and injured his employe. The employe sued both her employer (the operator of the car) and the car's owner. This court distinguished the relationships of the parties and their liabilities in their respective capacities, and refused to give to the workmen's compensation proceedings or statute the effect either of barring liability of the owner of the car (imposed by Vehicle Code section 402(a)) in favor of the injured person or of barring recovery by the owner, under the law of bailments, from the negligent operator (who was the employer of the injured person). Here, as in Baugh v. Rogers, the court will not extend operation of the defensive provisions of the Workmen's Compensation Act to bar actions to recover for liabilities which, although they may be in some indirect way connected with an employer-employe relationship, do not arise out of, or depend upon it, and are not expressly included within the terms of the statute.]

"* * * [Defendants] next argue that the award before the commission compensated * * * [plaintiff] for the injuries she now asserts. This same argument was repudiated by the courts of this state in the many cases above cited holding that the injured employee has an action against the insurance doctor for malpractice. The issues in the commission case and the malpractice case, and the items of damage recoverable in each case, are * * * different * * *.

"Liability of Dr. Harrison

"Dr. Harrison was an employee of Dr. Shane. Most of his arguments are predicated on the theory that Dr. Shane, as employer, is not liable for malpractice and that he, as an employee of Shane, should not be liable. Independently of the liability of Dr. Shane, it is hard to see how Dr. Harrison is in any different position than the insurance company doctor would have been had he been called in to treat * * * [plaintiff]. [No question of respondeat superior is involved. Both doctors personally treated the plaintiff.]

[13] "This * * * [defendant] also argues that the evidence is insufficient, as a matter of law, to show negligence on the part of either Dr. Shane or himself. The evidence has already been reviewed. The evidence clearly supports the implied finding of the jury that * * * [plaintiff] suffered a new and further injury by reason of treatments given to her by Drs. Shane and Harrison.

[14] "Because the expert evidence is to the effect that these subsequent injuries were the result of the negligence of both Drs. Shane and Harrison, the latter contends that, because he, as an employee, is not responsible for the acts of Dr. Shane, * * * [plaintiff has] failed to prove that his negligence was a proximate cause of the injury. Obviously, the jury must have found that Drs. Shane and Harrison were joint tort feasors. If they were joint tort feasors, both are liable for the full damage to * * * [plaintiff], at least in the absence of evidence to show facts upon which an apportionment could has been made. The burden of producing such evidence was on the * * * [defendants]. Summers v. Tice [1948], 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91; Finnegan v. Royal Realty Co. [1935], 35 Cal.2d 409, 218 P.2d 17. None was here produced.

"Excessive Damages

"No point is made that the general verdict, as to amount, is not supported by the evidence. * * * [Defendants] do, however, contend that the verdict is demonstrably excessive in the amount of $2,351.81.

[15] "The verdict and judgment were for $19,572.40 against Dr. Shane, his wife, The Shane Diagnostic Foundation and Dr. Harrison. In addition to proof of general damage, * * * [plaintiff] introduced into evidence, over objection, and pursuant to an amendment to her complaint pleading the amount of special damages, medical bills in the amount of $3,572.40. One bill was for $1,220.59, admittedly paid by * * * [plaintiff], and concerning which there is no complaint, and another for $2,351.81 paid by the Industrial Indemnity Company, the compensation carrier for Dr. Shane. The trial court instructed the jury that it could consider both bills in any award it might make. In view of the odd amount of

the judgment, it may be assumed that the jury included the $2,351.81 in its verdict. Nitta v. Haslam [1934], 138 Cal.App. 736, 747, 33 P.2d 678.

[16–18] "The trial court was correct in instructing that this item could be included in the verdict. Although the Industrial Indemnity Company did not file an independent action against Dr. Shane for the proportion of the amounts paid by it due to the malpractice of Dr. Shane and Dr. Harrison, after judgment it did file a lien for over $6,200, and later amended this lien to an even larger figure. Included within this claim of lien is the $2,351.81 item here involved. Such a lien is provided for by section 3850 through section 3862 of the Labor Code (formerly § 26 of the Workmen's Compensation Act) and may be filed any time before satisfaction of judgment. Jacobsen v. Industrial Accident Commission [1931], 212 Cal. 440, 448, 299 P. 66; Dighton v. Martin [1935], 4 Cal.App.2d 401, 403, 41 P.2d 197. It seems quite clear that, although as between the employee and his employer and carrier, the malpractice is compensable, insofar as the injury is due to malpractice and not due to the original industrial injury, the carrier can recover from the employer [who undertakes as a doctor to treat the employe] those portions of the amounts paid by it to the employee that are due to the malpractice. Certainly that would be true if the doctor guilty of malpractice were a third person, Dodds v. Stellar [1947, supra], 30 Cal.2d 496, 501, 183 P.2d 658; Heaton v. Kerlan [1946, supra], 27 Cal.2d 716, [719], 720, 166 P.2d 857, and no different result should follow when it is the employer who is charged with malpractice. [As already shown defendants are not charged with malpractice as the employer but solely in their other entirely separate capacity and relationship to the injured person.] The mere fact that it may be difficult to segregate the portion of the payments made by the carrier for the original injury from that portion due to the malpractice does not defeat the carrier's right to its lien. Jacobsen v. Industrial Accident Commission [1931, supra], 212 Cal. 440, 448, 299 P. 66.

"This being so, the questioned item is clearly recoverable by the employee in this action. Where the employee sues, and the carrier does not join in the action but seasonably files a lien, the employee may recover special damages common to both. * * *." In such event those damages are subject to the lien established by the carrier. See Labor Code, §§ 3855, 3856; Pacific Indemnity Co. v. California Electric Works, Ltd., 1938, 29 Cal.App.2d 260, 269, 84 P.2d 313.

The judgment is affirmed.

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39 Cal.2d 745

PETERSON et al. v. JOHNSON et al.

L. A. 22050.

Supreme Court of California, in Bank.
Oct. 21, 1952.

Action to quiet title to certain land. From a judgment of the Superior Court, Los Angeles County, A. A. Scott, J., for plaintiffs, two of four defendants appealed. The Supreme Court, Traynor, J., held that the statute authorizing redemption of part of a tract of land sold to the state for non-payment of taxes by paying the amount of the valuation placed by the assessor on the portion redeemed for the purpose of pro-rating taxes between it and the remaining portion is not unconstitutional because of failure to provide for an equalization hearing.

Judgment affirmed.

Prior opinion, Cal.App., 242 P.2d 678.

1. Taxation 🔑696

The statute authorizing purchaser of part of land, sold to state for nonpayment of taxes, to redeem such part by paying amount of valuation placed thereon by assessor for purpose of prorating taxes between it and remaining part of land, is not unconstitutional because of failure to provide for equalization hearing. Revenue and Taxation Code, §§ 4146–4155, 4154; Const. art. 13, § 9.

2. Taxation ⚷486

Before ad valorem tax on realty becomes final, taxpayer must be given opportunity to have assessor's valuation of realty reviewed by impartial board of equalization or other tribunal, but after assessment has been equalized or taxpayer has failed to avail himself of right to equalization hearing and tax has become final, taxpayer has no further right to such hearing. Const. art. 13, § 9.

3. Taxation ⚷695

Property sold to state for nonpayment of tax which has become final can be redeemed only on terms prescribed by legislature, as there is no constitutional right to redeem it, but such right comes entirely from statute and is subject to all limitations and conditions therein imposed.

4. Taxation ⚷709(1)

One claiming partial interest in property sold to state for nonpayment of taxes may be required to pay all taxes due, with penalties and costs, to effect redemption of property from such sale.

5. Taxation ⚷764(3)

The fact that description of land sold to state for nonpayment of taxes and amount of taxes due thereon, as stated in delinquent tax list, did not correspond to description and amount stated in later tax deed, conveying part of land to state after redemption of remaining part at valuation placed thereon by assessor for purpose of prorating taxes between two portions of land, did not render tax proceedings void. Revenue and Taxation Code, §§ 4146–4155, 4154.

6. Taxation ⚷712

The provision of partial tax sale redemption statute that auditor shall submit description of property sought to be redeemed to assessor, "who must place a valuation thereon," did not preclude assessor from placing separate valuations on such part for each year of tax delinquency thereof. Political Code, §§ 3813, 3817; Revenue and Taxation Code, § 2,4154.

7. Taxation ⚷688

Irregularities in omission of dollar sign from 1931 published delinquent tax list for Los Angeles County and stamping of assessment roll for land partially redeemed from tax sale to state as "redeemed," rather than "part-redeemed," were validated by 1943 curative act. Gen. Laws, Act 8443.

8. Army and Navy ⚷34

The Federal Soldiers' and Sailors' Civil Relief Act did not invalidate state's sale of tax forfeited land while one of owners thereof was in military service, where neither he nor his dependents occupied land for dwelling, agricultural or business purposes during such service. Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A. Appendix, § 501 et seq.

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John F. Poole, Los Angeles, and Alvan M. Palmer, Hollywood, for appellants.

Holbrook & Tarr and W. Sumner Holbrook, Jr., Los Angeles, for respondents.

Ray L. Chesebro, City Atty. Los Angeles, Louis A. Babior, and Spencer L. Halverson, Deputy City Attys., Los Angeles, amici curiæ on behalf of respondents.

TRAYNOR, Justice.

Defendants appeal from a judgment quieting plaintiffs' title to 80 acres of land in Los Angeles County.

The land was assessed to Russell F. Johnson in 1931 as an undivided part of 120 acres owned by him. In July of that year, he conveyed the entire parcel to his wife, Myrtle N. Johnson, who failed to pay the taxes as they became due. The delinquent tax list for the year 1931 was published, giving notice that the 120 acre parcel assessed to Russell F. Johnson would be sold to the state by operation of law unless $380.06 of taxes, penalties, and costs were paid. Neither Mr. nor Mrs. Johnson paid this amount or any part thereof.

In 1934, Mrs. Johnson conveyed 40 of the 120 acres to Josephine Palomara, who in turn conveyed them to plaintiff Peterson. Peterson redeemed the 40 acres under the partial redemption statute. Pol.Code, § 3818, now Rev. and Tax.Code, §§ 4146–4155. When Peterson applied for redemption of the 40 acres, the assessor placed a separate valuation on the part sought to be redeemed for each tax delinquent year.

The remaining acres were valued at the difference between the original valuation and the valuation placed on the 40 acres. The taxes were prorated so that each part of the land was charged with the same amount of taxes that each would have borne had the assessor made a separate assessment originally.

In 1937, the state took title to the remaining 80 acres under a tax deed. The deed described only the 80 unredeemed acres, and recited that they had been sold to the state in 1932 for $258.06. This figure was the unpaid balance of the 1931 taxes, penalties, and costs that had been prorated to the 80 acres. In May, 1939, Mrs. Johnson died intestate, leaving her husband and two sons as heirs. Defendant, Warren R. Johnson, one of the sons, was in military service from 1942 to 1945. In 1946, the sons assigned their interests in their mother's estate to their father. In 1945, Peterson and Smith bought the 80 acres from the state, and in 1947 brought this action to quiet their title thereto.

[1–4] The provisions of the partial redemption statute, Pol.Code, § 3818; now Rev. and Tax.Code, § 4154, require the assessor to place a valuation on the parcel to be redeemed for the purpose of prorating the taxes. Defendants contend that the statute is unconstitutional because it does not provide for an equalization hearing of the split valuation, and that the court therefore erred in rejecting defendants' offer to prove that the valuation placed on the 40 acres was much less than its true value and that an excessive valuation was therefore placed on the remaining 80 acres and in sustaining objections to the introduction of evidence as to the value of the property redeemed.

This contention confuses the rights of an owner before a tax upon his property becomes final and his rights after the property has been sold to the state for nonpayment of the tax. Before an ad valorem tax becomes final, the taxpayer must be given an opportunity to have the assessor's valuation reviewed by an impartial board of equalization or other tribunal. Cal.Const.Art. XIII, § 9; Bandini Estate Co. v. Los Angeles County, 28 Cal.App.2d 224, 230, 82 P.2d 185, and cases cited therein. After the assessment has been equalized, or the taxpayer has failed to avail himself of the right to an equalization hearing, and the tax levied against the property has become final, the taxpayer has no further right to an equalization hearing. If the property is thereafter sold to the state for nonpayment of the tax, it can be redeemed only upon the terms prescribed by the Legislature. "There is no constitutional right to redeem property that has been sold to the state for the nonpayment of taxes. 'The right of redemption comes entirely from the statute, and it is subject to all the limitations and conditions therein imposed.' Quinn v. Kenney, 47 Cal. 147 [150]." Sutter-Yuba Investment Co. v. Waste, 21 Cal.2d 781, 785, 136 P.2d 11, 14. Thus, one who claims a partial interest in tax-sold property may be required to pay all of the taxes, penalties, and costs to effect a redemption. Mayo v. Marshall, 23 Cal. 594, 595. It is only since 1917 that a purchaser of part of the property sold to the state for nonpayment of taxes could redeem that part for less than the amount necessary to redeem the whole.

The partial redemption provisions enable an owner of tax-sold property to take advantage of a market for part of the property where none exists for the whole. The purchaser not only gives him the purchase price, but reduces the amount necessary to be paid by the vendor should he wish to redeem. Moreover, it is the owner of the tax-sold property who creates the situation in which two persons rather than one become interested in redemption. The Legislature has seen fit to accommodate the parties by a division of the right to redeem, but neither party may demand that the procedure be other than that provided. Under the statute, the valuation of the assessor is final. The parties may, of course, contract in advance as to the amount to be paid by each and thus avoid any uncertainty as to the valuations the assessor may place upon the separate parts.

It is true that at one time (1917–1927), the Legislature provided for valuation by the auditor and prescribed a procedure for filing and hearing protests regarding the proposed division. As amended in 1927, the statute requires the auditor to secure the valuation from the assessor and omits the protest procedure. The Legislature apparently concluded that the assessor, who made the original valuation, could arrive at the correct division thereof without the necessity of further proceedings that would delay partial redemption.

[5] Defendants also contend that the tax proceedings were void, on the ground that the description and the amount of taxes set forth in the 1931 delinquent tax list do not correspond to those in the 1937 tax deed to the state. Defendants do not deny that the tax list correctly sets forth the amount of taxes, penalties, and costs owed the state or that the state had the power to declare the entire 120 acres sold for that amount. The proration of taxes between the property redeemed and the part not redeemed is inherent in the whole partial redemption procedure. At the time of the tax deed to the state in 1937, the 40 acres had been redeemed by Peterson. Since taxes remained unpaid only on the 80 acres, only 80 acres could be deeded to the state. Thus, after a partial redemption, the area subsequently deeded to the state and the amount for which it is sold will necessarily be less than that set forth in the delinquent list.

[6] Defendants contend that the proceedings after partial redemption were void on the ground that the assessor placed separate valuations on the 40 acres for each tax-delinquent year. Section 3818 of the Political Code at the time of the partial redemption provided that the auditor was to submit a description of the property sought to be redeemed to the assessor, "who must place a valuation thereon." The auditor was then to estimate the amount of taxes due thereon. Defendants interpret this language as authorizing the assessor to place only one valuation on the part to be redeemed and not a separate valuation for each year.

Property that has been sold to the state by operation of law is assessed as if no sale had taken place. Pol.Code, § 3813. Taxes thereafter levied must be paid in order to effect a redemption. Pol.Code, § 3817. They are also part of the taxes to be apportioned at the time of partial redemption. Since property values may fluctuate from year to year, the valuation upon which the apportionment is based must reflect such changes. To accomplish the purpose of the foregoing statutes, it was therefore necessary for the assessor to place a separate valuation on the property for each year. Section 4154 of the Revenue and Taxation Code makes this clear by providing: "The assessor shall immediately place a separate valuation on the parcel for each year for which it was delinquent and not separately valued * * *." See Rev. and Tax.Code, § 2.

[7] Defendants also contend that the tax proceedings were invalid, on the grounds that the dollar sign was omitted from the 1931 published delinquent list and that the original assessment roll had been stamped "redeemed" rather than "part-redeemed." These irregularities have long since been validated by the curative act of 1943, Stats. 1943, p. 1993, Gen. Laws, Act 8443. Wall v. M. & R. Sheep Co., 33 Cal.2d 768, 205 P.2d 14.

[8] Defendants contend finally that the provisions of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A.Appendix, § 501 et seq., render the sale by the state of the 80 acres invalid. Warren R. Johnson was in the military service at the time of this sale in February, 1945. That act is applicable only to real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service. McCaslin v. Hamblen, 37 Cal.2d 196, 202, 231 P.2d 1. Warren R. Johnson testified that neither he nor his dependents occupied the property for any of the specified purposes at the time of his military service. Thus, by virtue of its express provisions, the act is inapplicable here.

Judgment affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

39 Cal.2d 751

GRAYHILL DRILLING CO. v. SUPERIOR OIL CO.

L. A. 22492.

Supreme Court of California, in Bank.
Oct. 21, 1952.

Action to recover balance allegedly due for drilling of an oil well. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment of nonsuit against plaintiff, and plaintiff appealed. The Supreme Court, Traynor, J., held that where defendant's agent entered into oral modification of contract to drill oil well when plaintiff's agent informed him that plaintiff would not complete original contract, and defendant thereafter refused to pay amount due under oral contract, check tendered to plaintiff with letter stating that it was in full payment of amount due, which was accepted by plaintiff, constituted an accord and satisfaction.

Affirmed.

Prior opinion, 245 P.2d 500.

1. Accord and Satisfaction 🔑1

Where written contract and oral modification thereof were made, and were to be performed, in Oklahoma, and acts relied upon to establish accord and satisfaction took place in that state, but action for alleged balance due under oral contract was brought in California, the substantive law of Oklahoma was applicable.

2. Accord and Satisfaction 🔑11(3)

Under Oklahoma law, where creditor accepts check with notice that it was intended as full satisfaction for unliquidated claim, an accord and satisfaction has been established, even though creditor protests that he is not taking check in full payment of claim.

3. Accord and Satisfaction 🔑11(3)

Where there was a disputed claim as to amount due plaintiff for drilling oil well for defendant and plaintiff's agent informed defendant's agent that he would accept a certain sum in partial payment only, and defendant thereafter mailed check for that sum together with letter which stated that check was intended as full payment, and plaintiff thereafter cashed check, it was immaterial that plaintiff's agent had stated that he was unwilling to accept check in full payment.

4. Accord and Satisfaction 🔑26(3)

In action for breach of oral modification of contract to drill oil well, evidence was insufficient to establish that defendant, who claimed accord and satisfaction resulting from plaintiff's acceptance of check tendered in full payment, was not acting in good faith when he disputed amount due. 15 O.S.1951 § 237.

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Lee Combs and John Barry, Los Angeles, for appellant.

Hanna & Morton, Harold C. Morton, Edward A. Penprase, B. W. Burkhead, Los Angeles, and Max K. Jamison, Porterville, for respondent.

TRAYNOR, Justice.

Plaintiff appeals from a judgment of nonsuit entered in its action to recover the balance alleged due from defendant for the drilling of an oil well. The evidence, stated most favorably to plaintiff, is as follows: Plaintiff entered into a written contract with defendant to drill an oil well in Oklahoma. The contract was negotiated with defendant's agents Smith and Kunau and sent to California, where it was signed by defendant's vice-president Cody. It was then returned to Oklahoma, where it was executed by plaintiff. It provided that the well should be drilled to the Gibson sand, which was expected to be encountered at or below 6,500 feet. Plaintiff was to receive $5.25 per foot for the hole drilled up to 6,500 feet in depth, and $6 per foot thereafter, plus certain amounts for standby time. Drilling proceeded until a depth of somewhat over 4,000 feet was reached, at which depth a steep dip in the geological formation was encountered, and drilling became much more expensive. Plaintiff's vice-president and general manager Frederickson then informed defendant's Oklahoma agents that plaintiff would be unable to continue with the drilling unless more favorable terms could be agreed upon to compensate it for the unforeseen expenses and difficulties. Kunau, defendant's Oklahoma drilling and production superintendent, orally agreed to a modification of the contract whereby plaintiff should be paid at the contract rate of $5.25 per foot for the hole drilled up to that time, and on a cost plus basis thereafter. Drilling continued until a depth of 7,254 feet was reached, at which time the well was abandoned as a dry hole. Plaintiff then submitted three statements to defendant. One was for $96,872.63, described as the actual cost of the well; the second was for $100,121.42, based upon "footage contract to 4000′, actual cost from 4000′ to 7254′;" and the third was for $47,697.46, the amount that would have been earned under the terms of the original written contract. Defendant sent plaintiff a check for the latter amount, which was accepted and cashed after defendant's agent Smith assured Frederickson that it was not intended as a final settlement. Thereafter further negotiations took place between Frederickson, acting for plaintiff, and various officers and agents of defendant. These negotiations terminated when defendant's vice-president Cody met Frederickson in Oklahoma and offered him $23,000 in final settlement of their account. Frederickson said he would accept the $23,000, but not in final settlement. Defendant then forwarded its check for $23,000 together with a letter stating, "We are enclosing check No. 5305 in the amount of $23,000.00 in full and final settlement of balance of all claims and costs for drilling Craig No. 1 well in Garvin County, Oklahoma. This check is being sent in accordance with request of Mr. J. C. Cody." The voucher attached to the check bore the notation that it was "in full and final settlement of balance of all claims and costs for drilling Craig No. 1. * * *" Plaintiff cashed the check and later instituted this action for the balance it claims is due under the terms of the oral modification of the written contract. At the close of plaintiff's case defendant successfully moved for a nonsuit on the grounds that there was no proof that its Oklahoma agents had authority to modify the written contract, that the oral modification was invalid for lack of consideration and because it was not in writing, and that the evidence established an accord and satisfaction as a matter of law.

The defense of accord and satisfaction was recently considered in Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 234 P.2d 16, in a case factually similar to the present one. This court said, "The great weight of authority undoubtedly supports the rule that where a claim is disputed or unliquidated and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted 'in full discharge of his claim' or not at all, the retention and use of such check or draft constitutes an accord and satisfaction (1 C.J.S., Accord and Satisfaction, § 34, page 528); and it is immaterial that the 'creditor protests against accepting the tender in full payment' (1 Am. Jur. § 26, p. 228), for in such case 'the law permits but two alternatives, either reject or accept in accordance with the condition' (Williston on Contracts, Rev. Ed., Vol. VI, § 1856, p. 5220 * * *). Of course, for the principle of accord and satisfaction to apply in disposition of an unliquidated claim, there must be a 'bona fide dispute' between the parties (Stub v. Belmont, 20 Cal.2d 208, 218, 124 P.2d 826), but 'it matters not that there was no solid foundation for the dispute' as the test is whether 'the dispute was honest or fraudulent'. B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 171, 137 P. 624 * * *. Also, the debtor must make it clear that acceptance of what he tenders is subject to the condition that it shall be in full satisfaction. (Citations.)" 37 Cal.2d at 597, 234 P.2d at page 18.

[1–3] In the present case the written contract and the oral modification thereof were made and to be performed in Oklahoma, and the acts relied upon to establish an accord and satisfaction took place in that state. Accordingly, it is the substantive law of Oklahoma rather than that of California that must be considered. Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 485, 265 P. 190, 57 A.L.R. 696; see Restatement, Conflict of Laws, §§ 332, 373. Although there is language in some of the Oklahoma cases that indicates that an accord and satisfaction may be defeated if the creditor indicates that he does not intend to accept a check in full payment, see,

e. g., Deming Inv. Co. v. McLaughlin, 30 Okl. 20, 118 P. 380, 381; Gentry v. Fife, 56 Okl. 1, 155 P. 246, 247–248, it appears that when all of the conditions mentioned in the Potter case are satisfied, the Oklahoma cases hold that an accord and satisfaction has been established whether or not the creditor protests that he is not taking the check in full payment of his claim. Davis v. Davis, 103 Okl. 83, 229 P. 479, 483; Kubatsky v. Pittsburg Plate Glass Co., 119 Okl. 236, 249 P. 412, 415; see Metropolitan Life Ins. Co. v. Richter, 173 Okl. 489, 49 P.2d 94, 96; Commercial Union Assur. Co. v. Creek Cotton Oil Co., 96 Okl. 189, 221 P. 499, 502; Sanditen v. Allied Refining Co., 84 Okl. 47, 202 P. 316, 317. Accordingly in the present case, since the check was tendered on the clearly expressed condition that it was in full settlement of plaintiff's disputed claim, and plaintiff accepted and cashed it, it is immaterial that Frederickson stated at the time that he was unwilling to accept it in full payment.

Plaintiff contends, however, that there was evidence from which it could be inferred that defendant was not acting in good faith in disputing its claim. It relies on the following facts: Defendant did not question the authority of its Oklahoma agent to make the modification agreement until the time of trial. Only once during the negotiations was any question raised as to whether in fact the oral agreement had been made. At no time was any complaint made of the accuracy of the cost figures plaintiff submitted as the basis for additional compensation under the terms of the oral modification. Defendant's vice-president offered no explanation of how he arrived at the compromise figure of $23,000, other than to state that he thought it was fair.

If there was no dispute as to the validity of the oral modification agreement, it may be assumed that defendant's failure to question the accuracy of plaintiff's cost figures and its insistence on settling for a fraction of the amount claimed, would provide some evidence that the dispute over the amount due was not in good faith. See, Berger v. Lane, 190 Cal. 443, 448, 213 P. 45. Also, defendant's failure to question the authority of its Oklahoma agent to execute a modification of the contract until the time of the trial, and its failure, except in one instance during the course of the negotiations, to question whether the oral modification was in fact made, may provide some evidence that it did not seriously dispute either of these issues.

[4] Even if it is assumed, however, that there was no dispute over these factual questions, a serious legal question remained as to whether or not the oral modification was valid. After the well was completed, defendant was confronted with a claim based upon an oral modification of its written contract whereby the economic risk of drilling the well had been shifted from plaintiff to defendant. The result of this shift was approximately to double the cost of the well that defendant had agreed to pay. Plaintiff had obtained the modification by pointing out to defendant's agents that it would be forced to breach its contract if relief were not granted. Under these circumstances defendant was in a position seriously to contend that the oral modification was invalid because of lack of consideration and because it was not in writing, see, Okl.Stats.Ann., Title 15, Sec. 237, and it could reasonably resist the payment of any amount not due under the terms of the written contract. It is unnecessary to decide whether the trial court erred in sustaining defendant's contention that the oral modification was invalid. In view of the doubtfulness of defendant's owing plaintiff anything under that modification, its insistence on settling, if at all, for approximately forty per cent of plaintiff's claim, provides no evidence that its dispute was not in good faith.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

39 Cal.2d 773

SUNSET MILLING & GRAIN CO. v. ANDERSON.

L. A. 22396.

Supreme Court of California, in Bank.
Oct. 24, 1952.

Action on certain promissory notes delivered by defendant to plaintiff. Defendant moved for judgment of nonsuit at conclusion of plaintiff's case and plaintiff then moved to reopen case to present further testimony. The Superior Court, San Diego County, C. M. Monroe, J., denied plaintiff's motion and granted judgment of nonsuit, and plaintiff appealed. The Supreme Court, Edmonds, J., held that where an instrument purportedly releasing defendant from liability on promissory notes, which was relied upon as complete defense to action, was ambiguous in that it could not be determined in absence of extrinsic evidence that instrument referred to notes sued upon, such ambiguity, resolved in favor of plaintiff, precluded judgment of nonsuit.

Judgment reversed.

Prior opinion, 242 P.2d 941.

1. Pleading 🔑291(2)

Despite admission of genuineness and due execution of instrument attached to pleadings which results from failure to file affidavit denying same, the instrument may be controverted by evidence of fraud, mistake, undue influence, compromise, statute of limitations, estoppel, and like defenses, but neither its due execution nor its genuineness may be contested. Code Civ.Proc. § 448.

2. Pleading 🔑291(2)

Admission of genuineness and due execution of instrument attached to pleading which results from failure to file affidavit denying same necessarily includes an admission of authority of agent to sign name of principal to the document. Code Civ. Proc. § 448.

3. Principal and Agent 🔑132(1)

A disclosed principal may be held liable on a contract made solely in the name of the agent.

4. Principal and Agent 🔑132(1)

Instrument signed by representative of grain company providing that grain company would accept certain notes and issue credit for amount thereof to feed store without any financial responsibility to feed store, gave rise to inference that representative intended to bind grain company thereby, within statute providing that principal is bound if agent's intent to bind him is plainly inferable from instrument itself. Civ.Code, § 2337.

5. Principal and Agent 🔑1

A "representative" is one who represents others or another in a special capacity, as an agent, and term is interchangeable with "agent". Civ.Code, § 2295.

See publication Words and Phrases, for other judicial constructions and definitions of "Representative" and "Agent".

6. Pleading 🔑291(2)

In action upon notes, where instrument purportedly releasing defendant from liability thereon was set out in pleadings and was not denied by affidavit, plaintiff thereby admitted that instrument was what it purported to be and that it was executed and delivered by representative, who signed instrument, in representative capacity and with authority from plaintiff to do so. Code Civ.Proc. § 448.

7. Trial 🔑139(1), 142

A trial court must deny a motion for nonsuit at close of plaintiff's case if there is any substantial evidence which, with aid of all legitimate inferences favorable to plaintiff, tends to establish averments of complaint, or where plaintiff's evidence is sufficient to support judgment on verdict.

8. Appeal and Error 🔑927(3)

In disposing of an appeal from judgment of nonsuit, court must view evidence in light most favorable to appellant and must disregard all inconsistencies and draw only those inferences from evidence which can reasonably be drawn which are favorable to appellant.

9. Bills and Notes 🔑493(1)

Where evidence showed that notes sued upon were executed and delivered to plaintiff, it would be presumed that they were given for sufficient consideration, in absence of evidence to contrary. Code Civ.Proc. § 1963, subd. 21.

10. Release ⚿58(1)

Where instrument releasing defendant from liability, relied upon as complete defense to action on notes, was ambiguous, in that it could not be determined, in absence of extrinsic evidence, that instrument referred to notes sued upon, such ambiguity, resolved in favor of plaintiff, precluded judgment of nonsuit.

11. Pleading ⚿291(2)

Admission of genuineness and due execution of instrument, annexed to answer, releasing defendant from liability on notes, which resulted from plaintiff's failure to file affidavit denying same, did not include an admission that instrument related to notes sued upon, but plaintiff could controvert instrument by showing that it had no connection with notes. Code Civ.Proc. § 448.

12. Release ⚿55

In action upon notes, defendant who set out an instrument purportedly releasing him from liability on such notes, had burden of proving such new matter and connecting instrument with notes.

13. Pleading ⚿291(2)

In action upon notes, where instrument purportedly releasing defendant from liability thereon was set out in pleading and was not denied by affidavit, plaintiff would not be permitted, after entry of judgment for defendant, to file such affidavit, in absence of showing of inadvertence, neglect, or mistake of an excusable kind. Code Civ.Proc. § 448.

◆

Forster & Gemmill, Los Angeles, Stickney & Stickney, Edward Strop, San Diego, and Robert L. Meyer, Los Angeles, for appellant.

Charles B. De Long, San Diego, for respondent.

EDMONDS, Justice.

The Sunset Milling and Grain Company sued to recover the amount of principal and interest due upon a series of nine promissory notes executed and delivered to it by O. E. Anderson, doing business as Anderson Feed Store. Its appeal from a judgment of nonsuit challenges the correctness of the trial court's determination that an agreement pleaded by Anderson was a complete defense to the action.

By his answer, Anderson admitted the execution and delivery of the notes and alleged that they were made without consideration. The pleader then alleged the following facts:

Ralph Bangenter was field representative for Sunset Milling, C. Trevor Sawday its local salesman and representative. These men told Anderson that Milton Morgan was selling a feed business operated by him and from which Charles J. Brust had been buying Sunset Milling's feed. According to them, Morgan had taken Brust's promissory notes and given them, with duplicate notes of his own, to Sunset Milling for the feed sold. Bangenter and Sawday also represented to Anderson that the notes given, and to be given, by Brust were and would be secured by a chattel mortgage upon chickens which he was raising. As a bookkeeping procedure, they said, Sunset Milling would desire a promissory note from Anderson to be sent with each note taken from Brust, but Anderson would not be personally responsible for any of Brust's bills or notes or for his own notes in like amount.

On August 1, 1949, the date of the first note in the series, Sawday, on behalf of Sunset Milling and as its agent, executed and delivered to Anderson a written instrument which reads as follows: "To Whom It May Concern: I, C. Trevor Sawday, am an official representative of Sunset Milling and Grain Co., * * * I have informed O. E. Anderson, owner of the Anderson Feed Store * * * that he will in no way be responsible for the collection of the feed bills incurred by C. J. Brust, * * * and that all shipments of feed are covered by a chattel mortgage made out in favor of Morgan's Feed Store, * * * and the Sunset Milling and Grain Co. The Sunset Milling and Grain Co. will accept all notes and issue a credit for the amount of the note to the Anderson Feed Store without any financial responsibility to the Anderson Feed Store. Signed: C. Trevor Sawday, Representative of Sunset Milling and Grain Co."

The representation that Brust's notes were secured by a chattel mortgage was untrue, the answer continued. Anderson believed the representation and was deceived thereby into selling Sunset Milling's feed to Brust and taking his promissory notes, which he sent, together with his own notes of equal amount, to Sunset Milling. Each of the notes sued upon is a duplicate of one executed by Brust and representing a sale of feed to him. Sunset Milling recovered a judgment in an action against Brust upon the promissory notes given by him.

No affidavit denying the genuineness and due execution of the written instrument pleaded by Anderson was filed by Sunset Milling.

Upon the trial, Anderson's promissory notes were admitted in evidence. The credit manager of Sunset Milling testified that the notes had not been paid although payment had been demanded. On cross-examination, he stated that Sunset Milling also received notes executed by Brust in the same amount and bearing the same dates as Anderson's notes. None of Brust's notes had been paid and none was secured by a chattel mortgage. According to the credit manager, there was no written agreement concerning the arrangement whereby Brust's notes were received "in support of" Anderson's notes.

Following the presentation of this evidence, Sunset Milling rested its case and Anderson moved for a judgment of nonsuit. Thereafter, Sunset Milling moved to re-open the case to present further testimony and made a formal offer of proof. The motion to re-open was denied and a nonsuit granted upon the ground that the agreement pleaded in the answer was a complete defense to the action.

Sunset Milling contends that, regardless of the admission of genuineness and due execution which resulted from failure to file an affidavit in denial thereof, Code Civ.Proc. § 448, the judgment of nonsuit was erroneously granted. There is nothing in the writing or the evidence, it argues, which connects the writing to the notes which are the basis of the action. In addition, it contends that failure to file the affidavit did not admit the authority of Sawday to bind Sunset Milling to the contents of the writing. Several other defenses to the writing were open to it, according to Sunset Milling, despite its failure to file an affidavit. Finally, it asks this court, upon reversal, to permit the filing of an affidavit under the provisions of section 473 of the Code of Civil Procedure for relief from a judgment taken against a party through his mistake, inadvertence, surprise or excusable neglect.

Anderson disputes each of these contentions. He argues that the trial court, by implication, construed the writing as being related to the notes in controversy and that this construction is binding upon the appellate court. He also contends that failure to file the affidavit admitted the authority of Sawday to bind Sunset Milling. The suggested defenses to the instrument, he says, are without merit and there is no authority for permitting the filing of an affidavit at this time.

[1, 2] Despite the admission of "the genuineness and due execution" of the instrument which results from failure to file an affidavit "denying the same" in accordance with section 448 of the Code of Civil Procedure, the instrument may be controverted by evidence of fraud, mistake, undue influence, compromise, statute of limitations, estoppel, and like defenses, but neither its due execution nor its genuineness may be contested. Crandall v. Schnouser, 207 Cal. 772, 777–778, 279 P. 778; Garcia v. California Truck Co., 183 Cal. 767, 768, 192 P. 708; Moore v. Copp, 119 Cal. 429, 432, 51 P. 630; Sparks v. Sparks, 101 Cal.App.2d 129, 134–135, 225 P.2d 238; Miller v. McLaglen, 82 Cal.App.2d 219, 224–225, 186 P.2d 48. However, although many defenses to the instrument are permissible, it has been held repeatedly that the admission of genuineness and due execution necessarily includes an admission of the authority of the agent to sign the name of his principal to the document. Reynolds v. Pennsylvania Oil Co., 150 Cal. 629, 636, 89 P. 610; Knight v. Whitmore, 125 Cal. 198, 200, 57 P. 891; Bank of America, etc., Ass'n v. Richardson, 29 Cal.App.2d 554, 558, 85 P.2d 139; Siple v.

Knapp, 39 Cal.App. 638, 639, 179 P. 537; Quartz Glass & Mfg. Co. v. Joyce, 27 Cal. App. 523, 525–526, 150 P. 648.

Sunset Milling argues that this rule is inapplicable here because Sawday did not sign its name by himself as agent, but signed his own name, followed by a description of himself as its representative. For this proposition, it relies upon the rule that a deed executed by "A, attorney in fact for B" does not convey B's interest in the described property. This is the common-law rule of conveyancing, Morrison v. Bowman, 29 Cal. 337, 352, which has been made a part of the code. Civ. Code, § 1095; Mitchell v. Benjamin Franklin Bond & Indemnity Corp., 13 Cal. App.2d 447, 448, 57 P.2d 185. However, the code section refers only to instruments transferring an estate in real property and is inapplicable to other writings. California Pacific Title & Trust Co. v. Crocker First Nat. Bank, 131 Cal.App. 487, 493, 21 P.2d 475.

[3, 4] In the case of a simple contract, section 2337 of the Civil Code provides: "An instrument within the scope of his authority by which an agent intends to bind his principal, does bind him if such intent is plainly inferable from the instrument itself." "While some confusion and uncertainty existed in our early cases, it is now definitely settled in this state that a disclosed principal may be held liable on a contract made solely in the name of the agent." Bank of America, etc., Ass'n v. Cryer, 6 Cal.2d 485, 488, 58 P.2d 643, 644; Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 695–698, 272 P. 579; Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 64–68, 207 P. 539. Even before this principle was established, it was held that no particular form of signature was required to bind the principal so long as it appeared from the instrument itself that such result was intended. McCormick v. Stockton, etc., R. R. Co., 130 Cal. 100, 104–105, 62 P. 267; Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 371, 50 P. 650. From the face of the instrument under consideration here, it is plainly inferable that Sawday, as representative of Sunset Milling, intended to bind it to the promises which it is pledged to fulfill.

[5] Sunset Milling contends that the writing does not purport to bind it because it is signed as "representative" rather than as "agent". This attempted distinction is without merit because, for all general purposes, the designations are synonymous. Webster's New International Dictionary, 2d Ed., "Agent". "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." Civ.Code, § 2295; W. & P. Nicholls v. Mapes, 1 Cal. App. 349, 355, 82 P. 265; Black's Law Dictionary, 4th Ed., "Agent". "Representative" is defined as: "One who represents others or another in a special capacity; an agent, * * *. One who represents another as agent, * * *." Webster's New International Dictionary, 2d Ed. The terms may be used interchangeably. Texas Power & Light Co. v. Adamson, Tex.Civ.App., 203 S.W.2d 275, 276.

[6] The effect of the failure to file the affidavit as provided in section 448 is to admit that the instrument is what it purports to be on its face and that it was executed and delivered by Sawday in the capacity in which he appeared. Donovan v. Security-First Nat. Bank, 67 Cal.App.2d 845, 852–853, 155 P.2d 856. Therefore, it follows that the admission in this case, where the instrument purports upon its face to bind the principal, includes the authority of the agent so to do. The situation is substantially identical to that existing where the agent has signed the name of his principal to the document.

Myers v. Sierra Valley, etc., Ass'n, 122 Cal. 669, 675, 55 P. 689, upon which Sunset Milling relies, is distinguishable from the present situation because the instrument there being considered did not purport to have been made by the corporation. For that reason, the court said, an admission of its genuineness and due execution was not an admission that it was the corporation's note. Also distinguishable is Benedict v. Wilson, 10 Cal.App. 719, 723, 103 P. 350, cited by Sunset Milling. In that case, there was no issue as to an admission and the court held that a recital of a representative capacity in the body of the instrument could not be said to bind the third person as a matter of law. Here, the purported representative capacity is included within the admission of genuineness and due execution.

Regardless of the admission which resulted from failure to file the affidavit, Sunset Milling argues, the judgment of nonsuit was erroneous because there is nothing in the writing or the evidence to connect the instrument to the notes sued upon. Anderson answers this contention by claiming that the document is unambiguous and the trial court's construction of it as a complete defense to the action is binding upon the appellate court.

[7, 8] "A trial court must deny a motion for a nonsuit at the close of plaintiff's case 'if there is * * * any substantial evidence, which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averments of the complaint, or, in other words, where the plaintiff's evidence is sufficient to support a judgment on the verdict. * * *' And as to our duty, 'The uniform rule which an appellate court should follow in disposing of an appeal from a judgment of nonsuit is, that the court must view the evidence in the light most favorable to appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant. * * *'" Golceff v. Sugarman, 36 Cal.2d 152, 153, 222 P.2d 665, 666; Solon v. Lichtenstein, 39 Cal.2d 75, 77, 244 P.2d 907; Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 837–838, 161 P.2d 673, 164 A.L.R. 1.

[9] The evidence showed that the notes were executed and delivered to Sunset Milling by Anderson. In the absence of evidence to the contrary, it is to be presumed that they were given for sufficient consideration. Code Civ.Proc. § 1963, subd. 21. It was also shown that they were unpaid. The first of the series of notes is dated August 1, 1949, and the remainder are subsequent thereto. The instrument signed by Sawday is dated August 1 and refers to "feed bills incurred" by Brust, using the past tense. It states, in the future tense, that Sunset Milling "will accept all notes" and, later, that it will "issue a credit for the amount of the note", the latter phrase using the singular rather than the plural used elsewhere. The only reference is to Brust's notes; nowhere is mention made of notes to be executed by Anderson.

[10] The writing is clearly ambiguous upon its face. In the absence of extrinsic evidence, it cannot be determined whether it refers to completed transactions or events to occur in the future. There is nothing to indicate that it is intended to absolve Anderson from liability upon his own notes. The argument that the appellate court is bound by the construction given the instrument by the trial court is without merit when the appeal is from a judgment of nonsuit. Under such circumstances, the writing must be construed most favorably to Sunset Milling. For the purposes of the appeal, it must be held that there is no connection shown between the writing and the notes which are the basis of the action. Therefore, it cannot be said, as a matter of law, that the instrument constituted a complete defense to the action.

[11, 12] Sunset Milling's admission of genuineness and due execution of the instrument did not include an admission that it related to the notes sued upon. Fox v. Stockton Combined Harvester & Agricultural Works, 73 Cal. 273, 275–276, 15 P. 430. It was Anderson's duty to prove the new matter set up in his answer and to connect the instrument with the notes. Newsom v. Woollacott, 5 Cal.App. 722, 724, 91 P. 347. Notwithstanding the admission, Sunset Milling may controvert the instrument by showing that it had no connection with the notes. Moore v. Copp, supra. For these reasons, the trial court erred in granting the judgment of nonsuit.

[13] It is not contended that the trial court abused its discretion in denying the motion for relief under section 473 of the Code of Civil Procedure. However, Sunset Milling now urges this court to permit the filing of the affidavit required by sec-

tion 448 should the judgment be reversed. No showing is made by the briefs that there was any inadvertence, neglect, or mistake of an excusable kind, nor is any authority cited for the proposed procedure. The facts presented to the trial court at the time the motion was made do not indicate an abuse of discretion. No explanation was there made for the delay of almost six months in seeking relief. The determination having been made by the trial court in its discretion, and no error now being claimed, this court should not interfere with that ruling. Cf. Siple v. Knapp, supra, 39 Cal.App. at pages 639–640, 179 P. at pages 537, 538.

Sunset Milling does not claim that there was any error in denying its motion to reopen the case and, in view of the conclusions which have been reached, it is unnecessary to consider that ruling or the preceding formal offer of proof. Upon further proceedings, Sunset Milling may present any defense which it may have to the instrument pleaded in the answer, other than a denial of the genuineness or due execution of the writing or Sawday's authority to bind it thereby.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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113 Cal.App.2d 840

HOLBROOK v. BOARD OF EDUCATION OF PALO ALTO UNIFIED SCHOOL DIST. et al.

No. 15253.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1952.

Hearing Denied Dec. 22, 1952.

In a mandamus proceeding plaintiff was successful in establishing his acquisition of the status of a full time permanent employee of the defendant school district and that the district board had exceeded its authority in purporting to reducing him to the status of a part time permanent employee. The Superior Court, Santa Clara County, Byrl R. Salsman, J., ordered an item of $5,000 for attorney's fees stricken from plaintiff's cost bill, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that plaintiff was not entitled to attorney's fees.

Affirmed.

Mandamus ⚷190

Plaintiff, who successfully established in mandamus proceeding that defendant school district had exceeded its authority in purporting to reduce him to status of part time permanent employee, was nevertheless not entitled to recover $5,000 for attorney's fees. Code Civ.Proc. §§ 307–1059, 1067–1110b, 1095, 1109; Code Civ.Proc. §§ 1021, 1095; Education Code, §§ 13521–13559, 13554.

McDougall & Fairfax, Daryl H. Pearson, Palo Alto, for appellant.

Hardy & Carley, Homer B. Thompson, Palo Alto, for respondents.

FRED B. WOOD, Justice.

In this proceeding in mandamus plaintiff upon his former appeal, 37 Cal.2d 316, 231 P.2d 853, was successful in establishing his acquisition of the status of a full time permanent employee (a class room teacher of the defendant school district) and that the district board had exceeded its authority in purporting to reduce him to the status of a part time permanent employee.

After the remittitur went down following the decision upon the former appeal, plaintiff filed a memorandum of costs in the court below including an item of $5,000 for attorney's fees. The defendants moved and the trial court ordered that item stricken from the bill. From that order plaintiff has appealed.

Plaintiff does not claim that the law governing mandamus proceedings accords him attorney's fees as costs, nor could he do so successfully. The applicable title of the Code of Civil Procedure embraces sections 1067 to 1110b. Section 1109 adopts the provisions of part two, sections 307 to 1059, as the rules of practice in mandamus proceedings except as otherwise provided in that title. Section 1095 of that title recognizes costs but is silent concerning the elements thereof. Accordingly, section 1021 applies. It declares: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties * * *." See Kahn v. Smith, 23 Cal.2d 12, 15, 142 P.2d 13.

Plaintiff claims that the defendants, seeking to reduce his status from that of a full time to a part time employee, should have proceeded by action in the superior court as provided in article 2, chapter 11, division 7, of the Education Code, sections 13,521 to 13,559, for dismissal of a permanent employee for cause; that, if they had done so, plaintiff as the successful party in that proceeding would have recovered reasonable attorney's fees as costs under section 13,554 of that code; they should not be suffered to deprive him of his attorney's fees by forcing him to take the initiative in mandamus; and that in consequence he should be entitled to those fees as costs in this proceeding in mandamus. This process of reasoning, if valid, would at best lead to the conclusion that plaintiff in the present proceeding is entitled to damages, Code of Civil Procedure, § 1095, in the amount of the attorney's fees of which he was thus deprived. By no process of reasoning could such an element of damage be treated as an element of "costs" in this proceeding in mandamus. As plaintiff neither alleged nor proved the incurrence of attorney's fees as an element of damage, the assertion of such a claim now, in any form, comes too late. The order appealed from should be affirmed.

No inference is to be drawn that we approve of any step in plaintiff's line of reasoning. His major premise is that the expression "costs and necessary disbursements" as used in section 13,554 includes attorney's fees, contrary to the interpretation of a similar expression in section 1033 of the Code of Civil Procedure, Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 274, 83 P.2d 503; Bond v. United Railroads, 20 Cal.App. 124, 128 P. 786, and despite the use of a similar expression in the very statute which declares that, except as attorney's fees are "specifically" provided for, they are left to the agreement of the parties. Code of Civ.Proc. § 1021. Nor is it clear how under the circumstances of this case the mere failure of the defendants to file charges of misconduct or of inefficiency against plaintiff (that is what the cited Education Code sections would have entailed) violated any right of his and thereby created in him a cause of action for damages. They never had any such charges to file. They merely interpreted the permanent status which he acquired as part time not full time in nature, a view in which the superior court and an intermediate appellate court concurred.

The portion of the order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

113 Cal.App.2d 901

HARCOURT v. STOCKTON FOOD PRODUCTS, Inc.

Civ. 8172.

District Court of Appeal,
Third District, California.

Oct. 30, 1952.

Action to recover brokerage fees. The Superior Court, San Joaquin County, R. M. Dunne, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peek, J., held that where contract gave brokerage firm right to distribute packer's canned goods with certain exceptions on commission and firm handled other goods in direct competition with packer's line, firm was not given an exclusive right of sale and was not entitled to commission on direct sales by packer.

Affirmed.

1. Principal and Agent ⇨81(4)

Under a contract for an "exclusive agency" to sell the principal retains the right to dispose of the property by his own efforts and the agent is not entitled to a commission on sales made by principal.

See publication Words and Phrases, for other judicial constructions and definitions of "Exclusive Agency".

2. Principal and Agent ⚷81(4)

Under a contract for an "exclusive right of sale" the principal is liable for the agent's commission on any sale made by the principal, whether or not the agent's services contributed to such sale.

See publication Words and Phrases, for other judicial constructions and definitions of "Exclusive Right of Sale".

3. Principal and Agent ⚷1

Use of the words "exclusive agency" or "exclusive sale" in a contract is not conclusive as to type of agency, but, as in other cases involving interpretation, all the circumstances must be considered.

4. Brokers ⚷46

Where contract gave brokerage firm right to distribute packer's canned goods with certain exceptions for a commission, and firm handled other goods in direct competition with packer's line, firm was not given an "exclusive right of sale," and was not entitled to commission on direct sales by packer, notwithstanding that the agreement designated firm "exclusive sales agents".

5. Contracts ⚷170(1)

The conduct of the parties under a contract who have knowledge of the terms thereof and prior to any controversy is entitled to great weight in determining proper construction of the contract.

C. P. Dorr, San Francisco, for appellant.

Evans, O'Gara & McGuire, San Francisco, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in favor of defendant in an action by plaintiff to recover brokerage fees. The appeal is on a settled statement of facts in lieu of transcripts under Rule 7(b) of the Rules on Appeal.

The settled statement discloses that appellant is an individual engaged in the business of food brokerage in San Francisco. Respondent is a canning company with its principal place of business in Stockton.

In May of 1946, after negotiations, the parties entered into an agreement reading:

"May 13, 1946.

"Stockton Food Products, Inc.,
Stockton, California.

"Dear Mr. Bundy:

Attention: Mr. W. A. Bundy

"This letter will confirm our arrangement for the 1946 season.

"You appoint us your Exclusive Sales Agent for one-half of your total production of Canned Goods during 1946 and will pay us a brokerage of 5% on the gross sales thereof. The foregoing sentence means that one-half of each item packed by you in the period shall be sold exclusively through us under this agreement. All sales will be made on standard contract forms with the usual terms and conditions.

"We agree to exercise our best ability to successfully merchandise the pack at the most advantageous prices consistent with any ceilings that may be in effect and you will keep us advised continually of the status and size of the pack so that commitments we make will be proper. You will also keep us advised of your O.P.A. ceiling prices.

"It is understood all sales shall be subject to your final confirmation.

"As a convenience to you we hereby agree to invoice buyers and effect collections for shipments made for your account.

"If the foregoing meets with your approval, kindly sign one copy in the lower left hand side and return to us.

"Yours very truly,
Harcourt Greene Co.,
W. L. Harcourt

"Accepted and approved:
Stockton Food Products, Inc.,
By W. A. Bundy
President."

Shortly before the end of the fiscal year covered by this first agreement, the parties entered into a written agreement covering the 1947–1948 period. This agreement reads:

"May 26, 1947.

"Stockton Food Products, Inc.,
Filbert and Miner Streets,
Stockton, California
Attention: Mr. W. A. Bundy
President.

"Dear Mr. Bundy:

"This will confirm the verbal conversation which the writer had with you in your office at Stockton on Thursday, May 22nd.

"It is our understanding that you have appointed us as your Exclusive Sales Agents for the sales of your products any place in the United States and throughout the world, with the exception of possibly one half of your pack of Tomato Paste and Peeled Tomatoes, which you are reserving for sale through Dick Salamone, in New York City, and part of your pack of Cherries which may or may not be sold through the Mel-Williams Co. We understand that it is also agreeable to you that we imprint our letterhead showing this company as Sales Agents for the Stockton Food Products, Inc., and to put the name of the Stockton Food Products, Inc., on the door of our offices.

"The above arrangement, we understand, will apply to and be in effect for the 1947 pack and to extend from June 1st, 1947 to May 31st, 1948, which latter date, we understand, is the end of your fiscal year.

"You have agreed to keep us promptly and properly informed as to your pack from day to day by means of mailing to us each day a copy of your Daily Pack Record and Report.

"On all sales completely negotiated and shipped and paid for by buyers, we are to receive a brokerage of 5% of the gross selling price.

"On our part, we agree to agressively, diligently, and honestly represent you and shall endeavor at all times to promote and further the interests of the Stockton Food Products, Inc.

"If the above is in accordance with your recollection and understanding of our conversation and agreement, would appreciate your initialing the enclosed copy and returning it to us for our memorandum record.

"With kind regards from the writer, we are

"Yours very truly,
Harcourt Greene Co.,
/s/ W. L. Harcourt

"O K
/s/ W. A. Bundy"

During the period covered by this agreement appellant received daily pack records as well as weekly pack records. Also during this period while appellant was making sales of respondent's products, the respondent was also on divers occasions selling direct through other outlets. However during the entire period in question respondent first offered its merchandise to appellant and only sold through other outlets when appellant failed, neglected or was unable to do so.

It was stipulated that during the course of this relationship the appellant handled other canned goods under his own label as a principal and also as agent for other canners "which were directly competitive with the goods produced by respondent." The evidence indicates that when appellant received an order for canned goods he did not consider himself obligated to sell respondent's goods in preference to those of other competitive products he was handling.

The evidence also shows that an officer of the respondent upbraided appellant for not doing a "good job" under the 1947–1948 agreement and appellant admitted such to be the case, stating he had been occupied with other matters, but promised to do better.

The appellant was fully paid for all of the goods he himself sold for respondent and made no demands upon respondent for brokerage due on sales made by respondent through other outlets prior to the filing of the instant suit.

Prior to the filing of the present suit appellant filed suit on January 3, 1949, in the Superior Court of San Joaquin County, No. 45168 against respondent. The first count was for brokerage allegedly due. On March 16, 1949 this action was dismissed with prejudice. The evidence revealed that this action was settled out of court for a sum in excess of $12,000. "The attorney for appellant herein stated to the then attorney for respondent herein that the payment of this sum constituted the settlement of all the claims existing between Walter L. Harcourt doing business as Harcourt-Greene Company and Stockton Food Products, Inc." Appellant admitted that during this settlement he made no demand for other alleged brokerage due.

The present action was filed by appellant on October 26, 1949, several months after said settlement. The complaint was in four counts. The second count was dismissed, the fourth count was abandoned. In the remaining counts appellant seeks to recover damages for alleged breaches of written and oral agency contracts, the damages being the brokerage fees allegedly due on sales made by respondent through outlets other than appellant. The prayer limits the recovery to $15,000 on each of the two contractual periods involved.

It is appellant's contention on appeal that the effect of the contracts here in question was to give him the exclusive right to sell respondent's products. Hence he is entitled to a commission on all sales, including those made by respondent. The essence of such contention is that the evidence is insufficient to support the contrary conclusion reached by the trial court.

[1, 2] It is the well settled rule that generally if the agency established is an "exclusive agency" the principal retains the right to dispose of the property by his own efforts, and if a sale be consummated pursuant to such independent efforts by the owner the agent is not entitled to a commission thereon. On the other hand if the agency established gives the agent the "exclusive right of sale" generally the principal is liable for the agent's commission whether or not the agent's services contributed to such sale, since under the terms of such a contract the agent is the only person entitled to sell the property. See Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606; Chamberlin v. Gallucci, 110 Cal.App. 71, 293 P. 642; Hall v. King, 100 Cal.App. 70, 279 P. 814; Faith v. Meisetschlager, 45 Cal.App. 7, 187 P. 61; 1 Cal.Jur. 812, sec. 96; 4 Cal.Jur. 607, sec. 40.

[3] The distinction is clearly set forth in Wilck v. Herbert, 78 Cal.App.2d 392, where the court at page 413, 178 P.2d 25, at page 38 said:

> "* * * 'The use of the words "exclusive agency" or "exclusive sale" is not conclusive but, as in other cases involving interpretation, all the circumstances must be considered.' In Snook v. Page, 29 Cal.App. 246, at page 247, 155 P. 107, at page 107 the court said: 'The first question * * is whether the plaintiffs were constituted the *exclusive agents*, or were they given the exclusive *right* to sell said property? If the former only, the rule is well settled that: "The owner has the right to sell the same by his own unaided efforts without becoming liable to the broker for commission, that the only effect of such contract is to prevent the owner from placing the property in the hands of another agent, and that the owner does not thereby relinquish his right to sell the property himself independently of the broker."'"

[4] Considering then all of the circumstances and the evidence as disclosed by the record in the light most favorable to the respondent, we conclude that appellant's contention is not well founded.

[5] Furthermore, the conduct of the parties under a contract with knowledge of the terms thereof and prior to any controversy is entitled to great weight in determining its proper construction. Barham v. Barham, 33 Cal.2d 416, 202 P.2d 289.

Here it is shown that during the entire period of contractual relationship between the parties Harcourt handled other canned goods under his own label as a principal and also acted as agent for other canners whose products were directly competitive with respondent's products. In fact, it was appellant's testimony that he did not consider himself under obligation to sell respondent's goods in preference to those of competitive products he was handling. Also during this period respondent canning company made sales direct to certain companies handling its products. There is, however, nothing in the record to show that respondent ever appointed or made any sales through a second agent.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

114 Cal.App.2d 5

PEOPLE v. SELLARS.

Cr. 4832.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1952.

Defendant was convicted in Superior Court, Los Angeles County, Charles W. Fricke, J., of bookmaking, and he appealed. The District Court of Appeal, Doran, J., held that evidence sustained the conviction.

Judgment affirmed.

Gaming 🔑98(3)

Evidence sustained conviction for bookmaking. Penal Code § 337a.

Horace Appel, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and order denying a motion for a new trial.

Defendant was charged by information with the violation of section 337a of the Penal Code, which declares the law relating to "bookmaking" in that defendant did wilfully, etc., "record and register a bet and bets * * * upon the result * * *" etc., following the language of the statute.

A jury was duly waived and following a trial by the court defendant was adjudged guilty.

It is contended on appeal that "The evidence is insufficient to predicate the finding and decision of the court".

It would serve no useful purpose to recite the details. The evidence was typical of such offenses. Certain papers and notes were found on defendant which were identified by the officer, who qualified as an expert, as "records, or registers", on certain horse races, horses and bets.

A review of the record discloses that the evidence is sufficient to support the judgment.

The judgment and order are affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I concur. I find no similarity between the factual situation presented in the cases of People v. Simon, 66 Cal.App.2d 860, 153 P.2d 420 and People v. King, 111 Cal.App.2d 201, 244 P.2d 20, and the case at bar. In view of the papers, notes and documents found on the appellant, his failure to offer any defense whatsoever or to take the witness stand to explain or deny under oath the web of evidence woven about him was itself a potent fact for consideration by the trial judge and affords ample support for the judgment rendered, holding that defendant aided and abetted or advised and encouraged his wife in the commission of the offense charged.

PEOPLE v. HOWERTON.

Cr. 4837.

District Court of Appeal, Second District,
Division 1, California.
Oct. 15, 1952.

On petition for rehearing in criminal case of denial by the District Court of Appeal, 248 P.2d 98, of motion to dismiss appeal, the District Court of Appeal held that statement by court that final judgment in case was rendered on named date, when rights of parties to litigation were finally determined, was sufficient to indicate that on appeal the court would consider all matters reviewable on appeal from judgment and would not confine itself to consideration of matters reviewable upon an appeal from order made after judgment.

Petition for rehearing denied.

Criminal Law 🔑1134(1)

Statement that court was persuaded that final judgment under circumstances of case was rendered on certain date when rights of parties to litigation were finally determined, adequately indicated that on appeal from order entered on such date, court would consider all matters reviewable on appeal from judgment and would not confine itself to consideration of matters reviewable upon an appeal from order made after judgment.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

PER CURIAM.

In the petition for rehearing respondent urges that "it is not clear whether this court has held that such order (made April 9, 1952) was appealable as a final judgment of conviction or as an order made after judgment affecting the substantial rights of the appellant."

The notice of appeal filed herein was from "the *judgment* of the court made and entered on the 9th day of April, 1952." No attempt was made to predicate the appeal on an order made after judgment affecting the substantial rights of the accused. In our decision we clearly and explicitly stated that "we are persuaded that the *final judgment* under the circumstances of this case was rendered on April 9, 1952, when the right of the parties to the litigation were finally determined." [248 P.2d 98, 100.] We can conceive of no plainer language than the foregoing to indicate that on the appeal taken herein this court will consider all matters reviewable on an appeal from the judgment and will not confine itself to a consideration of matters reviewable upon an appeal from an order made after judgment and from which a timely appeal has been taken.

The petition for rehearing is denied.

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113 Cal.App.2d 804

PEOPLE v. WHITLOW.

Cr. 4816.

District Court of Appeal, Second District,
Division 2, California.
Oct. 23, 1952.

Defendant physician pleaded guilty to issuance of a false or fictitious prescription. The Superior Court of Ventura County, Walter J. Fourt, J., entered judgment of conviction but, upon defendant's motion to set aside judgment and declare plea of guilty null and void, granted the motion, and the people appealed. The District Court of Appeal, Fox, J., held that offense to which defendant had pleaded guilty was not one necessarily included in offense of unlawfully prescribing a narcotic to one who was not under defendant's treatment for a pathology or condition other than narcotic addiction.

Order affirmed.

1. Criminal Law 🔑199

Where one offense cannot be committed without necessarily committing a second, the second offense is a "necessarily included offense".

See publication Words and Phrases, for other judicial constructions and definitions of "Necessarily Included Offense".

2. Criminal Law ⚷199

Before a lesser offense can be said to constitute a necessary part of a greater offense, all the legal ingredients of the corpus delicti of the lesser offense must be included in the elements of the greater offense.

3. Druggists ⚷12

A "prescription" is a written instrument ordinarily used in ordering a drug or medical remedy. Health and Safety Code, §§ 11165, 11166.

See publication Words and Phrases, for other judicial constructions and definitions of "Prescription".

4. Indictment and Information ⚷191

Offense of issuing prescription that is false or fictitious is not necessarily included in offense of prescribing a narcotic to or for any person except by doctor in treatment for a pathology or condition other than narcotic addiction. Health and Safety Code, §§ 11163–11165, 11166.

5. False Pretenses ⚷6

A writing which is genuine and contains no false statements of fact cannot be a false token or writing, and the term "false writing" will not be construed to mean an unwarranted or false use of a genuine writing.

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Edmund G. Brown, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellant.

Samuel L. Kurland, Los Angeles for respondent.

FOX, Justice.

Defendant, a licensed physician, was charged in an information with twenty-two violations of sections 11163 and 11164 of the Health and Safety Code. In October, 1950, defendant moved to reduce the offenses charged in Counts I, VII and XV to misdemeanors under section 11165 of the Health and Safety Code, as lesser included offenses. Upon the granting of this motion, defendant pleaded guilty to said misdemeanor offenses. No new or amended information was filed charging violation of section 11165 of the Health and Safety Code. The district attorney then moved to dismiss all other counts in the information, which motion was granted.

In December, 1951, following a substitution of counsel, defendant filed a notice of motion and petition to set aside the judgment and to declare void and a nullity defendant's plea of guilty as to said Counts I, VII and XV on the grounds: (1) that said counts do not state a public offense because they do not charge that defendant did the acts complained of other than in the regular practice of his profession, and (2) that the offenses to which defendant pleaded guilty are not offenses necessarily included in section 11163 of the Health and Safety Code. In January, 1952, the court made an order vacating defendant's plea of guilty to Counts I, VII and XV and decreeing that the judgment based thereon was void. From this order the People appeal.

The charging portion of Count I, so far as here material, reads as follows: That defendant "* * * did then and there willfully, unlawfully and feloniously prescribe a narcotic, to-wit: 40 1/16 grain tablets of Dilaudid, a derivative of opium, to * * * who was not then and there under Defendant's treatment for a pathology or condition other than narcotic addiction * * *." Counts VII and XV charge violation of section 11163 in the precise manner of Count I, except as to the date of the offense and the name of the person for whom defendant prescribed the narcotic.

[1, 2] The decisive question is whether the offense described in section 11165 of the Health and Safety Code is one necessarily included in the information charging a violation of section 11163.[1] In our opinion it is not an included offense. "The test in this

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[1] Section 11163 of the Health and Safety Code, so far as it is here pertinent, provides: "Except in the regular practice of his profession, no person shall prescribe * * * a narcotic to or for any person who is not under his treat-

state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." People v. Greer, 30 Cal. 2d 589, 596, 184 P.2d 512, 516. If, in the commission of acts made unlawful by one statute, the offender must always violate another, the one offense is necessarily included in the other. People v. Krupa, 64 Cal.App.2d 592, 598, 149 P.2d 416. Thus, before a lesser offense can be said to constitute a necessary part of a greater offense, all the legal ingredients of the corpus delicti of the lesser offense must be included in the elements of the greater offense. People v. Greer, supra. It therefore follows that if an element necessary to establish the corpus delicti of the lesser offense is irrelevant to the proof of the greater offense, the lesser cannot be held to be a necessarily included offense.

[3] In the case at bar, the vital elements in establishing a violation of section 11165[2] consist of the issuance of a prescription which is false and fictitious. While no definition of the term "prescription" is contained in division 10, Health and Safety Code, the statutory language referring to prescriptions in section 11166, and in succeeding sections, indicates that the term implies a written instrument ordinarily used in ordering a drug or medical remedy. In Webster's New International Dictionary (2d Ed., Unabridged, 1947) the term "prescription" in its medical sense is defined as "A written direction for the preparation and use of a medicine * * *." The gist of the offense condemned in section 11165, therefore, is the issuance of a writing purporting to be a prescription which is false or fictitious in any respect. It would be false if it contained untrue statements, such as an incorrect name or address. It would be fictitious, by way of example, if it were a complete forgery.

[4] The gravamen of the offense defined in section 11163 as charged in the information is "to prescribe" a narcotic to or for a person not under treatment for a pathology or condition other than narcotic addiction. In this sense, the word "prescribe" means, according to Webster's (supra) "* * * to direct, designate or order the use of a remedy * * *." See Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 186, 4 P.2d 532, 77 A.L.R. 675. Thus, this offense may be committed without the use of a written prescription at all, as where a doctor in a hospital may prescribe or order a narcotic for a patient. Further, a written prescription for a narcotic may be in every respect regularly and accurately completed by a physician and yet the offense denounced in section 11163 may be committed. It follows that since a violation of 11163 does not necessarily involve a violation of section 11165, because elements indispensable to the lesser are unnecessary to the greater, the lesser is not a necessarily included offense.

[5] Plaintiff argues that by the use of the word "false" the element of good faith is injected into the crime defined in section 11165, so that where a prescription otherwise regular is used as the instrumentality for the violation of section 11163, the prescription is vitiated by the use to which it is put and is transmuted into a "false" document. We find no merit in this attempt to infuse into the simple context of section 11165 semantic subtleties unwarranted by its language. "A writing which is genuine and contains no false statements of fact cannot be a 'false token or writing.'" People v. Beilfuss, 59 Cal.App.2d 83, 91, 138 P.2d 332, 337. "The term 'false writing' will not be construed to mean an unwarranted or false use of a genuine writing." 35 C.J.S., False Pretenses, § 5, page 643.

In view of the foregoing conclusion it is unnecessary to consider the other question raised by counsel.

The order is affirmed.

McCOMB, Acting P. J., concurs.

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ment for a pathology or condition other than narcotic addiction, except as provided in this division."

[2] Section 11165 of the Health and Safety Code reads: "No person shall issue a prescription that is false or fictitious in any respect."

113 Cal.App.2d 799

PEOPLE v. WATSON.

Cr. 2764.

District Court of Appeal, First District,
Division 2, California.

Oct. 23, 1952.

Rehearing Denied Nov. 7, 1952.

Hearing Denied Dec. 15, 1952.

Defendant was convicted in the Superior Court, City and County of San Francisco, Harry J. Neubarth, J., of robbery and conspiracy to commit robbery, and he appealed. The District Court of Appeal, Dooling, J., held that improper cross-examination of defendant was not prejudicial error.

Judgment affirmed.

1. Robbery 🔑24(1)

Evidence sustained robbery conviction.

2. Criminal Law 🔑507(2)

Alleged fact that after robbery defendant and codefendant admitted their complicity to third person, was not sufficient to make third person an accomplice whose testimony was required to be corroborated.

3. Criminal Law 🔑507½

Evidence that prior to alleged robbery by defendant and codefendant the codefendant told third person that codefendant had a business proposition to make some money and wanted to know if third party knew any cool and nervy boys with whom codefendant could get in touch, was insufficient to establish that third party was an accomplice whose testimony was required to be corroborated.

4. Criminal Law 🔑1169(1)

Where witness for prosecution was not jointly charged with defendant in prosecution for robbery and conspiracy to commit robbery, and old robbery charge against witness was for a distinct offense and had already been dismissed, and there was no showing that any bargain had been made with witness in connection with dismissal of old charge, reception of his testimony was not prejudicial error on ground that it was given under promise of immunity.

5. Criminal Law 🔑855(5)

In prosecution for robbery and conspiracy to commit robbery, wherein witness for the prosecution testified that after the robbery defendant's codefendant showed witness a copy of newspaper having story relating to the robbery, it was not improper to exhibit a copy of the newspaper before the jury.

6. Criminal Law 🔑780(1)

In prosecution for robbery and conspiracy to commit robbery, giving of instruction relating to testimony of an accomplice and providing that the testimony of an accomplice ought to be viewed with distrust, was not error, though alleged accomplice testified for the defense, where the instruction was directed solely to prosecution witnesses whom jury might find to be accomplices.

7. Criminal Law 🔑1170½(5)

Witnesses 🔑337(4)

In prosecution for robbery and conspiracy to commit robbery, it was improper to cross-examine defendant about an alleged statement by him that he was not working but was out on the street attempting to "hustle tricks" for his girl friend, but such error was not prejudicial, where it was established that defendant was a narcotic addict and seller, that he had previously been convicted of burglary, and when arrested he was occupying an apartment with a woman to whom he was not married, and evidence was ample to sustain conviction.

◆

Timothy Watson pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Winslow Christian, Deputy Atty. Gen., Leo J. Vander Lans, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was charged with the crime of robbery and in a second information with conspiring with one Salisbury to commit robbery. One Augustine was charged with the same robbery but not with conspiracy. The three charges were tried together. During the trial Augustine changed his plea to guilty and appeared as a witness for the other defendants. Salisbury and appellant were found guilty of the conspiracy as charged and appellant was found guilty of the robbery. This appeal followed.

Two eye witnesses, the victims of the robbery, identified Watson and Augustine as the two men who committed it. The place robbed was a travel agency and in addition to some cash a large number of blank traveler's checks were taken. Checks aggregating $500 were found behind the grate in a fireplace in the apartment occupied by appellant. From the numbers these were identified as part of the checks taken in the robbery. After first denying any knowledge of these checks appellant later stated to a police officer that they had been given to him by one Don Harrison to purchase heroin. He gave the same explanation as to a larger quantity of such checks found at the residence of his mistress' grandmother.

[1] The evidence of appellant's guilt of the crime of robbery will, from this recital, be seen to be ample.

The principal evidence on the conspiracy charge came from one German. German was a friend of both Salisbury and appellant and testified that he was told by Salisbury some time prior to the robbery that Salisbury "had a business proposition to make some money * * * He wanted to know if I knew any colored boys I could get in touch with who were cool and nervy. I mentioned Watson's name." After the robbery both Watson and Salisbury admitted their complicity to German.

[2, 3] Appellant contends that this evidence establishes that German was an accomplice and argues that there was no sufficient corroboration of the accomplice's testimony. German's knowledge acquired after the robbery was not sufficient to make him an accomplice, People v. Viets, 79 Cal. App. 576, 590, 250 P. 588; People v. Collum, 122 Cal. 186, 54 P. 589, and the quoted testimony of German recommending appellant to Salisbury as a cool and nervy colored boy for a business proposition standing alone is not sufficient to establish any guilty knowledge in German.

It is true that Augustine gave testimony which if believed would have exonerated both appellant and Salisbury and would have implicated German as a conspirator to commit the robbery with Augustine. It is clear however that the jury did not believe Augustine or they would not have convicted appellant of the robbery since Augustine testified that German suggested the robbery to Augustine, and that appellant was not present with Augustine when the robbery was committed and had no connection with it, but that the other participant was a man named Robert Lindsay.

The jury was correctly instructed as to what constitutes an accomplice and the necessity for corroboration of his testimony and it is clear that they cannot have believed Augustine's testimony which would have implicated German as an accomplice in the crimes charged.

[4] German was arrested on an old charge of robbery not in any way connected with the crimes here in issue and that charge was dismissed before the trial. Appellant cites People v. Green, 102 Cal. App.2d 831, 228 P.2d 867, and contends that German's testimony was given under a promise of immunity and its reception was prejudicial error. The facts of the Green case were very different. There it was established that the witness was promised immunity on the express condition that he would give testimony *which would result in the conviction* of one jointly charged with him. Here German was not jointly charged with appellant, the charge against him of a distinct offense had already been dismissed, and no promise or bargain of any sort with him was proved. We can find no similarity between the cases.

[5] German testified that after the robbery Salisbury showed him a copy of an evening paper with a story and headlines relating to the robbery. A copy of this paper was exhibited before the jury. There was no impropriety in this since it was connected directly to one of the defendants on trial by his own statements to the witness. Appellant cites on this point cases holding that it is misconduct for jurors to read newspapers containing accounts of the trial. These cases stand on a

completely different ground and are not applicable to the question raised by appellant on this appeal.

The court instructed the jury:

> "The following instructions, ladies and gentlemen, cover the question of accomplice. We have heard quite a bit by both sides, and before I read them, briefly let me say that if two people were involved in a crime, and one were apprehended and the first one said that John Smith was with him at the time of the robbery, and that is the only evidence against that second person, that would not be sufficient to convict that second person. Do you understand that? You have to have other evidence besides the mere statement of one of the persons who was involved in the particular crime. In other words, a conviction may not be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. Whether or not any witness in this case was an accomplice as defined in the instructions is for the jury to determine from all the testimony, the circumstances, as shown by the evidence. To render a person an accomplice, he or she must in some manner, knowingly, and with criminal intent, aid, abet, assist or participate in the criminal act. If you should find that any witness in this case so conducted himself in respect to the crime charged, you must find that he was an accomplice.
>
> "The corroboration of the testimony of an accomplice required by the law is not sufficient if it merely shows the commission of the offense or some or all of the circumstances thereof, or if it does no more than raise a suspicion of the guilt of the defendant. On the other hand, it is not necessary that the corroboration extend to every fact and detail covered by the testimony of the accomplice. The corroboration of the testimony of an accomplice is sufficient if, of itself, alone, it tends to connect the defendant with the commission of the offense, although it may be slight and although, if standing by itself, it would be entitled to but little consideration. It is the law that the testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution, and in the light of all the evidence in the case."

[6] Appellant singles the one sentence out of this instruction: "It is the law that the testimony of an accomplice ought to be viewed with distrust", and claims that it was error to give it since Augustine was clearly an accomplice and it has been held error to give such an instruction where an accomplice testified for the defense. People v. Hartung, 101 Cal.App.2d 292, 225 P.2d 614. A reading of the instruction as given demonstrates that it was directed solely to prosecution witnesses whom the jury might find to be accomplices. It would have been error for the court not to give the sentence complained of as a part of the instruction on the testimony of prosecution witnesses who are found to be accomplices in view of Augustine's testimony which, if believed, would have established that the prosecution's witness German was an accomplice. People v. Hamilton, 33 Cal.2d 45, 51, 198 P.2d 873. We can find no error in the instruction in the form in which it was given.

Finally appellant complains that on cross-examination he was examined about a previous statement in which he had said: "I wasn't working. I get out on the street, try to hustle tricks, and things like that. Q. Tricks for your girl friend? A. Yes."

[7] While we can see no justification for bringing this matter before the jury, in view of the facts that it had been established that appellant was a narcotic addict and seller, that he had previously been convicted of burglary and when arrested was

occupying an apartment with a woman to whom he was not married, and the strength of the evidence of his guilt we are satisfied that this error was not prejudicial.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

TURNER v. MELLON et al. *

Civ. 15104.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1952.

Rehearing Denied Nov. 26, 1952.

Hearing Granted Dec. 22, 1952.

Action against employer and employee for false arrest and false imprisonment. The Superior Court of the State of California in and for the City and County of San Francisco, Robert McWilliams, J., rendered judgment for the defendant employer notwithstanding the jury verdict in favor of plaintiff as against both defendants and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that there was evidence of sufficient substantiality to support the jury verdict for plaintiff.

Reversed with directions.

1. Judgment 🔑199(3.10)

Motion for judgment notwithstanding verdict may not properly be granted unless there is no evidence of sufficient substantiality to support verdict in favor of plaintiff.

2. False Imprisonment 🔑15(3)

Liability of employer, for acts of his employee in causing a false arrest or false imprisonment, depends upon whether employer previously authorized or later ratified it or whether act of employee was within scope of his employment.

3. False Imprisonment 🔑15(3)

Where act of employee in causing an arrest or imprisonment is for purpose of protecting or recovering property of his employer entrusted to custody and safeguarding of employee, act of employee is deemed within scope of employment, but when employee's act is for purpose of punishing culprit for offense already committed it is not within scope of his employment.

4. False Imprisonment 🔑22

In action for false arrest and false imprisonment, burden was upon defendants to prove existence of probable cause.

5. False Imprisonment 🔑39

In action for false arrest and false imprisonment, evidence was sufficient for jury on issue as to whether defendant employer was legally responsible for acts of its branch manager, in calling police and mistakenly identifying plaintiff as person who had robbed employer on four previous occasions, resulting in plaintiff's detention.

◆

Wm. J. Connolly, San Francisco, for appellant.

Pillsbury, Madison & Sutro, John A. Sutro, Francis N. Marshall, Harry C. Scott, Jr., San Francisco, for respondent.

FRED B. WOOD, Justice.

In this action for damages for false arrest and false imprisonment, the jury gave its verdict in favor of plaintiff Albert Turner against defendant Tevis Mellon and Western Union Telegraph Company, a corporation. The company's motion for judgment notwithstanding the verdict was granted and plaintiff has appealed. Mellon did not appeal.

The principal issue is whether or not there was substantial evidence that the company was legally responsible for the acts of Mellon, its branch manager, in calling the police and mistakenly identifying plaintiff as the person who had robbed the company on four previous occasions, resulting in plaintiff's detention for some twenty hours.

Our examination of the record, in the light of the applicable principles of law, convinces us there was evidence sufficient for the consideration of the jury on that issue and that the judgment should be reversed with directions for entry of judgment upon the verdict.

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* Subsequent opinion 257 P.2d 15.

[1] The first applicable legal principle is that a motion for judgment notwithstanding a verdict may not properly be granted unless there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. Washington v. City & County of San Francisco, 111 Cal.App.2d 368, 244 P.2d 774.

[2, 3] The second principle is that which determines the liability of the employer for the acts of his agent or employee, when applied to the facts of the particular case. The liability of an employer for the act of his employee in causing a false arrest or false imprisonment depends upon whether the employer previously authorized or later ratified it or whether the act of the employee was within the scope of his employment. Here there is some evidence of express authority to do the act, and some of ratification, but the evidence of implied authority is more substantial and upon that we rest our decision. We refer to the principle, applicable here, which recognizes a distinction between an arrest or imprisonment made or caused for the purpose of protecting or recovering the property of the employer (property entrusted to the custody and safeguarding of the employee) and one made or caused for the purpose of punishing of culprit for an offense already committed. In the former type of case, the act of the employee is deemed within the scope of his employment; in the latter, not. See Korkman v. Hanlon Drydock, etc., Co., 53 Cal.App. 147, 149–154, 199 P. 880; Mackie v. Ambassador Hotel, etc., Corp., 123 Cal.App. 215, 223–224, 11 P.2d 3; Pierre v. Great Atlantic, etc., Tea Co., 4 Cal.App. 2d 468, 471, 40 P.2d 909; Peckham v. Warner Bros. Pictures, Inc., 36 Cal.App.2d 214, 220–221, 97 P.2d 472; 22 Am.Jur. 380, False Imprisonment, § 38; 35 A.L.R. 645, 654–656; 77 A.L.R. 927, 930; and 18 A.L.R.2d 402, 407–409.

In the Korkman case the general manager of defendant's business caused the arrest of a workman to head him off from causing a threatened jurisdictional strike which would interfere with the conduct of the employer's business and interrupt and retard the conduct of its work. This arrest, designed to prevent or terminate a present interference with the business or property of the employer, was in furtherance of duty of the general manager, as manager of the business or custodian of the property of the employer. In the Mackie case, the reviewing court recognized the principle but found no evidence indicating the arrest was made to effect recovery of the stolen property. Moreover, the employee who took some part in the arrest was not legally responsible for the arrest or for the detention. Naturally, his principal was not liable. In the Pierre case there was some evidence that the store manager caused the arrest for the purpose of collecting money paid out on a bad check, mistakenly believing that plaintiff was the issuer of that check. In reversing a judgment and order of nonsuit, the reviewing court said: "In the instant case it was a question of fact to be submitted to the jury as to whether Seaman was acting for his employer in attempting to collect for the latter money to reimburse it for a check which had been cashed during the course of its business, and was using criminal process to accomplish this result. The evidence presented by plaintiff, which must be construed in the light most favorable to her case in considering the court's ruling, is such that we cannot say as a matter of law that Seaman was acting outside the course and scope of his employment." At page 471 of 4 Cal.App.2d, at page 911 of 40 P.2d, a petition for a hearing after judgment in the District Court of Appeal was denied by the Supreme Court, 4 Cal.App.2d page 472, 40 P.2d 909. In the Peckham case although the court did not mention the distinction here under discussion, it was reasonably inferable from the evidence that the arrest of a picket leader during a strike was made for the purpose of preventing interference with the business and injury to the property of the employer. In reversing the judgment based upon a verdict directed for the employer the reviewing court held it was a question of fact for determination by the jury whether or not in making the arrest the agent of the corporate defendant acted within the scope of his authority, and the Supreme Court denied a petition for a hearing after judgment in the District Court of Appeal.

In our case, Mellon was night manager for the company's branch office at 471 Market Street, San Francisco, situated in the Sheldon Building at the southeast corner of Market and First Streets. His hours were from 2 P.M. to 10:30 P.M. His duties included handling messages, handling the general duties of counter clerk, locking the office at 10:30; making up accounts; paying out money. Ordinarily he was directed in his duties by the day manager and officials at the main office. Most of his instructions came through B. A. Scott, assistant to the city superintendent.

Mellon was in charge of the office from 4:30 P.M., the time when the day manager went off duty, until the office was closed at night. A company regulation declared that the night manager should see that all monies taken in by other employees who leave work before the end of his tour of duty are turned over to him. Scott testified that Mellon as night manager had responsibility for all the Western Union funds in his control. A company letter to superintendents, managers and branch managers warned them to be on the alert in all cases of large sums of money handled after banking hours, especially at night, and advised that every precaution be taken to safeguard such funds and that careful descriptions be made of persons present in the lobby or directly outside. Another similar letter stressed the importance of safeguarding company funds and the need for vigilance in the handling of those funds. Scott testified that Mellon as night branch manager had a duty to perform in the safeguarding of Western Union funds in his custody. A company bulletin on Procedure When a Theft Occurs declared, "Upon discovery of a theft of the Company's funds the following steps should be taken by the Manager immediately:—(a) Notify the local police authorities and secure their cooperation in finding the thief."

Prior to April 8, 1949, the day of plaintiff's false arrest, Mellon had been robbed four times at this office, each time by the same person, the thief taking only company money. The first of these robberies occurred January 5, 1949, at 8:30 P.M., the thief obtaining $741. The next was at 10:15 P.M. on February 14, the robber getting around $200. The third occurrence was February 26, at 5:20 P.M. The fourth holdup was on March 15, at 8:45 P.M.

The first three robberies, Mellon reported to the police. He also called the company's assistant superintendent, B. A. Scott, after each of the robberies and Scott came to the office and checked the cash. One of them, Scott or Mellon, called the police after the fourth robbery.

Following the fourth holdup and before plaintiff's arrest, Scott installed a buzzer system and arranged with the police for its use. A push button, installed next to the safe, would sound alarms in other parts of the building where plainclothesmen were stationed from about 6:00 P.M. until closing time. It was installed in an effort to apprehend the holdup man. Scott instructed Mellon to sound the alarm if the holdup man came back. Lieutenant Martin Lee, the police official with whom Scott made this arrangement, was asked, "At that time was Mr. Mellon given authority in the presence of Mr. Scott or by Mr. Scott or his associate to cooperate with the police department in the apprehension of this holdup man?" He answered: "I don't think there was any formal agreement. My impression is that was understood."

About 2:30 in the afternoon of April 8, 1949, Mellon observed plaintiff standing on the corner of First and Market Streets, just outside the office, waiting for the traffic signal. He fitted the description of the robber. Mellon watched him. He crossed First Street and went westerly on Market Street and then turned around and in two or three minutes came back down toward the Western Union office again. He came all the way past the office, going in an easterly direction on Market Street. Mellon went to the front door and stepped out on the sidewalk and took another look but the man had disappeared. Mellon did not see him in the block or across the street or any place. Mellon then called the police and told them he saw the robber pass the office or a man that looked like him. In three to five minutes Mellon saw the plaintiff again on Market Street, going west; saw him cross First Street and continue westerly on Market. A policeman in a car answered the call. Mellon got in the car. About the middle of the next block Mellon pointed plaintiff out to the policeman who stopped his car and apprehended plaintiff. Mellon remained in the car. They then went to the police station. Mellon did not swear out a complaint for plaintiff's arrest. The next morning Mellon received a call from the hall of justice, to come down to try to identify plaintiff and file charges. He went to the hall of justice in response to that call. Plaintiff was brought into the room. A police officer told Mellon he could file charges if certain that plaintiff was the man, but, if Mellon was not certain, plaintiff would be released. Mellon got a good close look at plaintiff and heard his voice; was not fully convinced that plaintiff was the man; did not sign the complaint.

This evidence tends to prove that in watching the movements of the supposed holdup man (who was passing and repassing the scene of his four recent robberies, very likely planning his fifth), in reporting him and pointing him out to the police, Mellon quite definitely had in mind the protection and preservation of his employer's funds, by the prevention of further robberies which such a course of action upon Mellon's part conceivably was well calculated to effect.

The threat of the thief's return and further depredations, was very real in the mind of the company's assistant superintendent Scott and of the police, else they would not have installed the buzzer and stationed policemen in the building between 6 and 10:30 P.M. each day. That threat, evidently, was no less real in the mind of Mellon. He was the man in immediate charge of the company's money, responsible for its safe-keeping, and enjoined by the company to be ever vigilant in its safe-keeping. Such apprehension upon the part of all of them was well founded based as it was upon four robberies in a short period of time, further vindicated by the thief's returning and again holding Mellon up and taking company money at 9:20 P.M. on the eleventh day of April, only three days after the arrest of plaintiff. Mellon became so disturbed by "the suspense" which he said he could not stand, that he quit work on April 16, and resigned his position on April 20, 1949. In his resignation he wrote "This office, with me the victim, has been held up and robbed five times in about four months. I am afraid to work here any longer." Without doubt the jury reasonably could infer that in watching plaintiff that day, reporting his presence and pointing him out to the police, Mellon's purpose was the prevention of further theft of company property in his custody and control, acting in the discharge of his duty to safeguard that property, by a method calculated to effect the desired purpose and, under all the circumstances of the case, reasonably within the scope of his authority to use.

[4, 5] The defendant company claims further in support of the judgment, that Mellon took no active part in the arrest or detention and had probable cause for the identification. The trial judge did not so view it. He denied Mellon's motion for judgment notwithstanding the verdict. The record sustains him in that denial. Concerning the degree of Mellon's participation in the arrest, the facts are very like those in Turner v. Elliott, 91 Cal.App.2d 901, at pages 902–904, 206 P.2d 48, in which a similar contention was overruled. As to probable cause, the burden rested upon Mellon to prove its existence. That, in view of the evidence adduced, was a question for determination by the jury. As a reviewing court we cannot say as a matter of law that probable cause existed in the sense of rendering Mellon immune from legal responsibility for his participation in the arrest and detention of the plaintiff. Sebring v. Harris, 20 Cal.App. 56, 58, 128 P. 7; Mackie v. Ambassador Hotel etc. Corp., 123 Cal.App. 215, 221, 11 P.2d 3.

The judgment is reversed with directions that judgment be entered upon the verdict in favor of plaintiff and against defendant Western Union Telegraph Company.

PETERS, P. J., and BRAY, J., concur.

113 Cal.App.2d 773

MANHA v. GRASS VALLEY MEAT CO. et al.

Civ. 8170.

Sac. 6265.

District Court of Appeal, Third District, California.

Oct. 22, 1952.

Action for conversion of eleven head of cattle. The Superior Court, Nevada County, James Snell, J., found for defendants, and plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem., held that evidence sustained finding against plaintiff's allegation of ownership of the cattle.

Affirmed.

1. Trover and Conversion ⚷34(1)

In conversion action, defendant's answer, which denied plaintiff's ownership on information and belief, was sufficient to place plaintiff's title in issue.

2. Pleading ⚷427

Issues may be made at trial as well as by pleadings, and parties who treat matters in issue will not afterwards be heard to say that no such issue was raised at trial.

3. Trover and Conversion ⚷40(3)

In action for conversion of 11 head of cattle, evidence sustained finding against plaintiff's allegation of ownership of the cattle.

4. Evidence ⚷231(1)

In action for conversion of 11 head of cattle, trial court properly excluded evidence purporting to show that party from whom defendant had bought the cattle but who was not a party or witness to the action had been convicted for transporting 11 head of stolen cattle bearing plaintiff's brand in interstate commerce, in absence of showing as to ownership of the cattle so transported.

Kearney & Adams, Reno, Nev., Lewis & Lewis, Sacramento, for appellant.

Lynne Kelly, Grass Valley, Louis V. Skinner, Reno, Nev., for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendants in an action brought for the conversion of 11 head of cattle.

The complaint was in three counts, alleging the wrongful conversion to their own use by defendants of 11 head of appellant's cattle, of a reasonable value of $2,200, with an additional $400 claimed as reasonable compensation for efforts expended in pursuit of the aforesaid personal property. Paragraph I of the complaint alleged: "That at all times herein mentioned plaintiff was the owner of and entitled to the immediate possession of the following personal property: Eleven (11) head of white face cattle, branded M 7 on right hip."

Defendants' denial of plaintiff's ownership of the cattle was in the following form: "Allege that these defendants are informed and believe that at all times mentioned in said complaint, H. R. Kain was the owner of, or was vested with power and authority to sell for and on behalf of the owner of, and entitled to the immediate possession of the personal property described in said complaint, and placing their denial on such information and belief, deny each and every, all and singular, the allegations contained in paragraph numbered I of the first cause of action of said complaint."

The trial court found against plaintiff's allegation of ownership and also found: "That plaintiff has failed to prove his title to, ownership of, or right to possession of the personal property described in said complaint. That said answering defendants acquired a good and valid title to said personal property as against plaintiff by their purchase thereof from H. R. Kain." The court found further against plaintiff's allegations as to conversion and reasonable value, and found that defendants had used reasonable care in determining title to the cattle, and believed Kain to be the owner, and had negotiated their purchase from him for the sum of $1,365.55.

The principal contention of appellant is that the evidence does not support the judgment, and before discussing this and other contentions of appellant we shall give a brief summary of the evidence as shown by the record.

Appellant, operator of a cattle ranch near Fallon, Nevada, testified that he heard rumors of cattle rustling, had his herd checked, learned from his employees that 59 head of his cattle were missing, and in his efforts to trace the cattle he traveled as far as Reno, Nevada. He used the brand M 7 on the right hip, and he heard from the witness Williams that respondents had bought and slaughtered 11 head of white-faced cattle branded M 7 on the right hip, whereupon he made demand upon respondents for payment at the rate of $200 per head on the assumption that they were his cattle and were four to five years of age. On cross-examination, appellant admitted that he customarily sold about 80 head of cattle each year, and that he had on occasion sold young cattle bearing his brand, for shipment to California, though it was his usual custom to sell only the older animals. One Dexter Hurley testified that he met Kain on April 21, 1948 at his (Hurley's) home in Fallon, Nevada, that they left Fallon at about 11:00 p. m. that night and proceeded to the Sparks stockyard where they loaded 11 head of cattle, and proceeded at 4:00 or 5:00 a. m. on April 22, 1948 to Grass Valley, California, arriving there at about 2:00 p. m. of April 22nd. Hurley said the cattle they loaded were branded M 7, and that he knew of his own knowledge that that brand belonged to appellant. He said they took the cattle to the Grass Valley Meat Packing Company where, in the absence of anyone else, they spoke to Mrs. Gliko, wife of one of respondents herein, who told them to unload the cattle, which they did at the Grass Valley Meat Company slaughterhouse corrals. Respondent Gliko testified that the cattle were slaughtered within two days at most from date of purchase on April 22, 1948, although he was not himself present; that as soon as the animals were slaughtered the hides were placed in a vat of brine solution, the same as hides of any other animals slaughtered; that within a few days of the transaction one Tom Williams of the Nevada State Police telephoned him to inquire if he had purchased four or five cows from a "Doc Kain"; that he readily admitted having purchased some cattle from Kain; that pursuant to Williams' request he had several of his employees go through the vat to pick out the first eleven M 7 hides, although the vat contained about 500 hides, from all states in the Union, and that the eleven hides which were taken out were the first ones of that brand which they came across and were not the only M 7 hides in the vat at that time. Gliko further testified that he did not then know the M 7 brand was that of appellant. He also testified that they had purchased three M 7's from one Angelo Piazzi, although it later developed that this testimony was not based upon his personal dealings with Piazzi, but on his agent's dealings with Piazzi. Gliko's testimony as to the age of the cattle was that they ranged from 3 to 9 years, with half being less than 5 years old and half being above that age. Williams testified that the day after his 'phone conversation with Gliko he went to Grass Valley, that Gliko cooperated by having the hide vat checked and that four M 7 hides were pulled therefrom, that he took one of these though he finally threw it away because it spoiled. Williams also testified that he asked to see the bill of sale covering respondents' purchase from Kain, noted that the brand was listed as on the left hip instead of the right, and told Mrs. Gliko to change it, which she did. There was also introduced into evidence, over defense counsel's objection, a "Livestock Transportation Permit," issued to H. R. Kain, for the transportation of 11 head of cattle, brand M 7 RH, loading point Fernley Valley, destination Grass Valley. One Wayne Cutlip testified that appellant Manha was not the only owner of the right hip M 7 brand, that the brand was also used by an Indian in Nevada, and that he had seen such cattle. While appellant Manha testified that he was the owner of the M 7 brand, he produced no evidence of having registered it as his lawful brand. Appellant did attempt to offer into evidence the Federal District Court record showing the conviction of Kain for the transportation in interstate commerce of 11 white-faced cows branded M 7 on the right hip which Kain knew to have been stolen; defendants' objection was sustained, and the court refused the offered evidence.

[1, 2] Appellant first attacks the finding against him as to title by claiming that by reason of the form of respondents' denial there was no issue in the pleadings as to the ownership of the cattle. Appellant cites Harpending v. Meyer, 55 Cal. 555, at page 560, where the court said:

> "We are unable to perceive, however, that a person can ever be considered a *bona fide* purchaser of goods from one who has no right to sell, in a case where the rule of *caveat emptor* applies. The law imputes notice to him. Under that rule he is not only put upon inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it."

Appellant argues that respondents, being conclusively presumed to know the title to the cattle possessed by Kain, would not be permitted to allege Kain's title on information and belief as they did, and any denial of appellant's title on that ground would not raise an issue, citing 21 Cal.Jur., sec. 100, p. 149, as to matters presumptively known to a defendant.

There is no merit in this contention of appellant for several reasons. The Harpending case cited by appellant did not deal with a matter of pleading but only with the statute of limitations. It appears from the record that the instant action was tried on the theory that the title was in issue; in fact, practically all of the evidence was directed to that issue. And as stated in 2 Cal.Jur., p. 1031: "* * * it must be remembered that issues may be made at the trial as well as by the pleadings. And if the parties treat certain matters as in issue, they will not afterwards be heard to say that no such issue was raised on the trial."

Furthermore, we believe that under the circumstances of the instant case it was proper for respondents to deny appellant's title on information and belief as they did. Kain informed them that he was the owner of the cattle and showed them a transportation permit, and they purchased the cattle relying on such information. While they might well have made a simple denial of appellant's title, we are satisfied that the form of respondents' denial sufficiently placed appellant's title in issue and that no possible prejudice resulted to appellant.

Appellant next asserts that the evidence does not support the finding against his claim of title. He argues that the undisputed evidence in the record indicates that the cattle belonged to him, and then cites the rule that a court may not completely disregard the undisputed evidence.

In Norgard v. Estate of Norgard, 54 Cal.App.2d 82, at page 89, 128 P.2d 566, at page 569, this court said:

> "* * * The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so. Davis v. Judson, 159 Cal. 121, 113 P. 147. As was said by our Supreme Court in the very recent case of Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 871: 'There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility." Section 2061, subd. 3 of the Code of Civil Procedure provides: "That a witness false in one part of his testimony is to be distrusted in others." In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. See cases collected in 27 Cal.Jur. 180, § 154.'"

And as was said in the case of Davis v. Judson, 159 Cal. 121, at page 128, 113 P. 147, at page 150:

> "It is insisted by appellants that this testimony of Wilson stood uncontradicted, and that the court had no right

arbitrarily to reject it and find to the contrary.

> "While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

Applying the test of these authorities to the testimony of appellant's witnesses we believe it cannot be said that "there are no matters or circumstances which at all impair its accuracy," and that even if appellant's contention that it is undisputed were correct the trial court was compelled to find in accordance with appellant's contention.

However, as pointed out by respondents, there was evidence that appellant was not the only person using the M 7 brand and that appellant had failed to link up the 11 head purchased by respondents with the 59 head which he had lost because those 59 were last seen at or near Fallon, Nevada, and the 11 first came into the testimony at Sparks.

Furthermore, respondents are entitled to rely upon the disputable presumptions contained in section 1963, subdivisions 11 and 12, of the Code of Civil Procedure, "That things which a person possesses are owned by him", and "That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership". Whiteside v. United Theatres, 106 Cal.App.2d 471, 235 P.2d 261, 265. These presumptions, of course, are a species of evidence.

[3] While it must be conceded that the preponderance of the evidence indicates strongly that appellant was the owner of the 11 head of cattle, we cannot say upon the record here, and in view of the presumptions referred to, that the finding of the trial court to the contrary is without support in the record. Appellant could only prevail upon the strength of his own title and it was for the trial court to weigh the evidence produced by appellant against the presumptions and other evidence.

[4] Appellant contends also that the court erred in the rejection of material evidence offered by him, to wit, the record of criminal conviction of Kain, wherein there was a plea of guilty. Appellant's theory is that the declarations of the thief as to the ownership of property found in his possession are admissible against one deriving title through him, and that pleas of guilty in criminal cases, where such pleas constitute a material admission of responsibility, are admissible.

There is no merit in the contention. In the first place the record offered was not a case involving the theft of cattle but was a prosecution for transportation in interstate commerce of stolen cattle with nothing to show the ownership of the cattle so transported. Kain was neither a party to nor a witness in the instant action and respondents were not parties to the criminal action, and there is no possible theory upon which such evidence would be admissible.

No other points raised require discussion.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

113 Cal.App.2d 789

PEOPLE v. VAN BUSKIRK.

Cr. 2357.

District Court of Appeal, Third District, California.

Oct. 22, 1952.

Defendant was convicted in the Superior Court, Stanislaus County, Sherrill Halbert, J., of attempted murder and he appealed from the judgment and from order denying motion for new trial. The District Court of Appeal, Peek, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Homicide 🔑25

Crime of attempted murder is complete if there is a concurrence of the intent to commit such crime with a direct, although ineffectual, act done towards its commission and if the means used by the defendant and the surrounding circumstances make the crime apparently possible.

2. Homicide 🔑256

Where it was shown that defendant had gone to home of witness, met his intended victims, that he made threats to take witness' life, that he fired shot over witness' head and attempted to shoot witness but was prevented from firing second shot by defective gun, evidence sustained conviction for attempt to commit murder.

3. Homicide 🔑300(7)

In prosecution for attempted murder, requested instruction that the first time defendant fired the gun, he only intended to frighten witness and if when he pulled trigger the second time mechanism was in such condition that gun would not fire, then defendant could not be guilty was properly refused as inapplicable to evidence.

4. Criminal Law 🔑778(6)

In prosecution for attempted murder, requested instruction that firing a gun at person in itself creates no presumption but that defendant intended to murder the person whom he fired at, was properly refused as it would have the effect of removing the actual firing of the gun from consideration of jury in determining specific intent.

5. Homicide 🔑286(1)

In prosecution for attempted murder, trial court's refusal to give proposed instruction related to the abandonment of a criminal intent as manifested by an unequivocal act was not error where there was no evidence of abandonment.

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Carlos J. Badger (of Gant & Badger), Modesto, for appellant.

Gail A. Strader, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from his conviction of attempted murder and from the order denying his motion for a new trial.

Defendant, his wife and daughter had been living with defendant's sister and her husband, Mr. and Mrs. Brown. The complaining witness, Brown, had not seen the defendant for approximately two weeks prior to the date of the alleged offense.

After writing a note, which is hereinafter set forth at length, defendant proceeded to the home of his brother-in-law, armed with a 25-caliber Colt automatic. No one was there on his arrival, but shortly thereafter the Browns and their three children, and Mrs. Van Buskirk and her child, arrived in the Brown car. Defendant was on the front porch when they drove up. Defendant walked over to the left front fender of the car. Brown got out and passed around the front of the car on the way to help the others out of the car. Defendant then said to Brown that he "came out to settle it all," that he was "going to kill us all."

Brown hurried the women and children into the house. When he returned defendant was standing by the left front fender with his right hand in his hip pocket. As Brown approached defendant made a statement to the effect that Brown "could beat the hell out of him, but he had a gun and it was loaded." Brown attempted to talk him out of his plan to kill all of them but defendant brought the gun out of his pocket, raised it to an angle, apparently pointing over Brown's head and fired. After the shot was fired defendant pointed the gun directly at Brown who continued to try to talk him out of his plan. Defendant replied he was "an old man, he had lived his life and he didn't care what happened to him." He also said he knew the persons in the house were calling the police but "we would all be dead before they got there." At that moment the sheriff's car turned the corner. Defendant, noticing this, again stated he was going to kill them all, whereupon he pulled the trigger of the gun, but it failed to fire. He then turned and ran to the side door of the house, trying to gain entrance into the house. Brown, after the misfire, ducked down, using the car as a shield. While standing by the door defendant ejected a shell and put another in the gun and again leveled it at Brown. A short time later the officers found defendant was then hiding in the bushes near the house.

The gun was in such a worn condition that after being fired it would not always recock in a manner which would successfully allow a second shot merely by squeezing the trigger, but it could be properly recocked by hand so it would fire even when such situation did occur.

Defendant's statement after being arrested was to the effect that his only purpose in going to the Brown home and his reason for firing the shot over Brown's head was merely to scare the Browns and his wife so that he would be allowed to visit his daughter. However upon his person was found a note addressed to the district attorney, which read:

> "The reason I am killing my wife and her in laws is because they will not let me see my baby and any one that shuts me off from seeing my baby is headed for hell. My brother-in-law is first, and my sister-in-law is second, and my wife is third, and I am fourth. I am sorry to do this but it has been coming on for about 8 months. The baby needs her mother and her dad next, but the sister-in-law does not believe it. The sister-in-law is the cause of it all because she does not like me, never has.
>
> "A. G. Van Buskirk."

Because of defendant's failure to comply with the Rules on Appeal, particularly with regard to Rule 15, the Court has found it extremely difficult to ascertain the exact grounds upon which defendant bases his appeal. However we will assume that two contentions have been made, the first, the usual contention that the evidence is insufficient to sustain the conviction, and, the second, that the court erred in failing to give certain instructions proposed by defendant. Both contentions are wholly without merit.

If the Court is correct in its assumption that the defendant first attacks the sufficiency of the evidence to support the verdict, such attack appears to be upon the theory that since the first shot was not fired at Brown but was fired over his head and thereafter defendant could not fire the gun because of mechanical difficulties hence he was incapable of committing the crime of attempted murder. That, in any event, his only purpose in going to the Brown home was to frighten his wife and the Browns into allowing him to see his daughter.

[1] The crime of attempted murder is complete if there is a concurrence of the intent to commit such crime with a direct, although ineffectual, act done towards its commission, People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913; People v. Lee Kong, 95 Cal. 666, 30 P. 800, 17 L.R.A. 626; People v. Grant, 105 Cal.App.2d 347, 233 P.2d 660; People v. Neal, 97 Cal.App.2d 668, 218 P.2d 556; People v. Parrish, 87 Cal.App.2d 853, 197 P.2d 804; People v. Lanzit, 70 Cal.App. 498, 233 P. 816, and if the means used by the defendant and the surrounding circumstances make the crime apparently possible. People v. Lee Kong, supra; People v. Fiegelman, 33 Cal.App.2d 100, 91 P.2d 156; In re Magidson, 32 Cal. App. 566, 163 P. 689; 7 Cal.Jur. 879, sec. 33; 22 C.J.S., Criminal Law, § 77 p. 142; 14 Am.Jur. 817, sec. 69.

In the instant case the evidence shows that he went to the Brown home and there met his intended victims; that while standing near Brown he made several threats to take Brown's life; that he pulled a gun and fired over Brown's head and that upon the arrival of the officers he attempted to shoot

Brown, only failing to do so by reason of the defective recocking mechanism and the approach of the officers that left him no time to manually cock the gun and fire. Furthermore the record also shows that prior to this time he had written the note to the district attorney in which he explained the action he contemplated.

[2] Under these facts we think it clear that the defendant, with specific intent, made a direct, although ineffectual, act toward the commission of the crime with means and under circumstances appearing to make such crime possible of commission. No more than this is required under the law.

[3] The defendant's next attack is directed at the failure of the court to give his proposed instruction No. 24. That instruction would have directed the jury in positive terms that if the first time the defendant fired the gun he only intended to frighten Brown and if when he pulled the trigger the second time the mechanism was in such condition that the gun would not fire, then defendant could not be guilty of the offense charged. The proposed instruction was inapplicable under the facts as shown by the record. For the same reasons as are set forth in the preceding paragraph in answer to defendant's first contention such instruction was an erroneous statement of law. Hence the court's refusal to give the same was proper. See 8 Cal.Jur. 321.

[4] Defendant's next contention is that the court erred in failing to give his proposed instruction No. 33, which reads: "Firing a gun at a person in itself creates no presumption of law that the defendant intended to murder the person fired at." In support of this contention he cites and relies upon two cases, People v. Snyder, 15 Cal.2d 706, 104 P.2d 639, and People v. Maciel, 71 Cal.App. 213, 234 P. 877. Neither of the cases so cited supports the correctness of the proffered instructions. In the Snyder case the Supreme Court, upon facts which are wholly dissimilar to the instant case, reversed the trial court on the ground that the court had given erroneous instructions and not upon the ground that the instruction similar to the one offered by defendant herein was refused. Likewise in the Maciel case the judgment of conviction of assault with intent to commit murder was reversed on the ground that the court erroneously instructed the jury with respect to the requirement approving specific intent. As the court in that case stated in 71 Cal.App. at page 218, 234 P. at page 880:

> "* * * It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with a criminal intent. 16 C.J. p. 81. When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. It is none the less a question of fact though it cannot be proved by direct and positive evidence. *All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury, and no presumption of law can ever arise that will decide it.*" (Citations.) (Emphasis added.)

An instruction, such as here proposed, would have the effect of removing one of the important circumstances surrounding the occurrence, namely, the actual firing of the gun, from the consideration of the jury in determining specific intent. Therefore the converse of the proposition enunciated in those cases does not hold true, and refusal of this instruction was proper.

[5] Defendant lastly contends that the court also erred in failing to give his proposed instruction No. 36 which related to the abandonment of a criminal intent as manifest by an unequivocal act. Again we find nothing in the evidence to support such a contention. It is too clear to warrant further discussion that such facts are wholly devoid of any evidence of abandonment.

The judgment and order are affirmed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

113 Cal.App.2d 885

COCKERHAM et al. v. HATHAWAY et al.

Civ. 4449.

District Court of Appeal, Fourth District, California.

Oct. 29, 1952.

Action on a note given in connection with a real estate transaction. The Superior Court of Riverside County, R. A. Moore, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the finding that there was a default in the payment of interest was not supported by the evidence.

Judgment reversed in so far as payment was ordered on note.

1. Vendor and Purchaser ⚷315(3)

In action on note given in connection with transaction by which defendants were to purchase certain realty from plaintiff, wherein plaintiffs alleged that defendants had failed to pay certain interest due, and that by reason such default elected to declare whole amount due, evidence was insufficient to sustain finding that there had been default in payment of interest.

2. Evidence ⚷441(8)

Where agreement by which defendant was to purchase realty from plaintiffs was embodied in written contract, any evidence as to preliminary negotiations could not affect terms of written contract, and could not authorize holding that certain note was given and accepted as present down payment, if contract disclosed a contrary intention.

3. Vendor and Purchaser ⚷77

Contract for purchase of realty by defendant from plaintiffs which required nothing but interest on purchase price until two years after date, and which thereafter stated that intent and purpose was to insure that defendants had purchased the property, and that to this end notes for full purchase price had been given in lieu of a down payment, did not indicate that one of the two notes given was to be a down payment, and did not warrant such a finding, but intent clearly manifested was that notes for full purchase price were given in lieu of making any down payment.

4. Vendor and Purchaser ⚷87

If contract by which defendant gave notes for full purchase price of realty in lieu of down payment thereon was terminated by mutual consent of the parties, and possession reassumed by plaintiff, not only the contract, but the notes as well, were at an end, and suit could not be maintained upon them.

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Arlo E. Rickett, Jr., Pomona, for appellants.

Alva D. McGuire, Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action on a note given in connection with a real estate transaction. On June 20, 1949, the parties executed a contract providing for the sale of certain real property by the plaintiffs to the defendants "for the sum of $23,000, in currency of the United States." The contract provided that this purchase price was to be paid

> "* * * as follows, to wit: $3000 or more dollars to be paid on or before two years from date. Balance of 20,000 dollars to be paid at 150.00 dollars or more each month beginning two years from date. Payments include interest on amortised balance @ 6% and continuing until all of principal and interest have been paid in full. Beginning June 20,1949 and continuing to the time that the 3000.00 above mentioned is paid. Party of the second part agrees to pay to the party of the first part, interest on 23000.00 @ 6% per annum payable in monthly installments of 115.00 each month. This interest is not to apply to purchase price of property."

It then provided:

> "The intent and purpose of this instrument is to insure the partys of the first part that partys of the second part has purchased the property and in *leu* of a cash down payment and to this end the partys of the second part have given to the partys of the first part notes totaling the amount of the pur-

chase price, which on default of any interest or principle payment become immediately due and payable at the option of the holder."

At the same time and as a part of the same transaction the defendants gave the plaintiffs two notes, both dated June 20, 1949. One was for $3,000 payable two years after date, with interest at 6% payable monthly. The other was for $20,000 "to be paid according to real estate purchace agreement of even date."

On June 20, 1949, and on the 20th day of each month thereafter, to and including November 20, 1949, the defendants paid $115, which the plaintiffs applied as interest on the two notes without any segregation. On December 20, 1949, the defendants paid $57.50 which the plaintiffs marked "Interest to January 5–50." On January 5, 1950, the defendants surrendered the property and the plaintiffs took possession, and shortly thereafter sold it to another party.

On January 23, 1950, the plaintiffs filed suit on this $3,000 note, alleging that the defendants had failed to pay $57.50 interest which was due on December 20, 1949, and that by reason of such default they elected to declare the whole amount due. In their answer the defendants relied on the entire contract, including both notes, and denied that anything was due. They also filed a cross-complaint seeking to quiet their title to the property on the theory that if the two notes were to be considered as payments, the purchase price was fully paid, and the defendants had no further interest in the property.

So far as material here, the court found that by the contract of June 20, 1949, the plaintiffs had agreed to buy this real property for $23,000, of which sum $3,000 was evidenced by this note; that this $3,000 note was given and accepted "as a present payment and in lieu of cash or lawful money"; that the defendants had defaulted in paying interest on this note "on the 20th day of December, 1950, and on said date there was due and unpaid the sum of $7.50 accrued interest"; and that the plaintiffs had elected to declare the whole note due. It was also found that the defendants had no interest in the property in question. Judgment was entered on the note in favor of the plaintiffs, and decreeing that the defendants had no title or interest in the property. The defendants have appealed.

The appeal is presented on a settled statement which includes the pleadings, findings and judgment; the original contracts and notes; the original list of payments credited by the plaintiffs; and a statement of all the evidence material to the issues, as stipulated by the parties. In addition to testimony as to the execution of the contract and notes, the only evidence set forth is as follows: The plaintiffs testified that the two notes equalled the full purchase price of the property; that the amounts listed were received, and applied "against the total interest on the two notes," and not divided between them; and that while the details of the transaction were being discussed, Mr. Hathaway said "that if Cockerham would accept a $3000 promissory note, instead of cash, he would pay the note in any event, in lieu of a cash payment of that amount." Mr. Hathaway testified that it was his understanding that the real property was to stand as security for the payment of the two notes; and that when he moved out of the property Mr. Cockerham told him that "he was very sorry this had to happen and everything would be all right." Within a few days after possession was given back to the plaintiffs they advertised the property for sale and sold it to another party, who has occupied it ever since.

[1] The finding that there was a default in the payment of interest on December 20, 1950 (1949 was intended) is entirely without support in the evidence. Assuming that interest was payable in advance the only evidence in the record, which is in the handwriting of Mr. Cockerham, shows that such interest was paid and accepted up to January 5, 1950.

[2] In our opinion, the other finding that the $3,000 note was given and accepted "as a present payment" is without support since the contract clearly discloses a con-

trary intention. Any evidence as to the preliminary negotiations could not affect the terms of the written contract.

[3] After providing how and when the purchase price was to be paid, with nothing but interest required until two years after date, the contract states that its intent and purpose is to insure that the defendants have purchased the property, and that to this end notes for the full purchase price had been given in lieu of a down payment. These notes contained stringent default conditions not otherwise provided for in the contract. This "intent and purpose" clause refers to both notes covering the full purchase price, and clearly means that both notes were given for the purpose stated and in lieu of any down payment. The clause cannot be interpreted as providing that the $3,000 note should be treated separately and considered as a present paymant, without doing violence to the expressed intent. While the grammar and punctuation are faulty, the meaning of the language used is clear. The contract neither provides nor indicates that the $3,000 note is to be a down payment. It clearly provides that notes for the full purchase price were being given in lieu of making any down payment.

The contract also contained a clause providing that if the buyers failed to comply with any of its terms "all money and notes theretofore paid" should be considered as liquidated damages. Not only were none of these notes paid, but if this was intended to refer to notes *given* it referred to both notes covering the full purchase price, in which case it was in violation of the meaning and intent of sections 1670 and 1671 of the Civil Code. Under such circumstances it could not be liquidated damages, in a permissible form, and could only be interpreted as providing for a penalty, and proof of the damage suffered was necessary. Nakagawa v. Okamoto, 164 Cal. 718, 130 P. 707.

[4] A further consideration is that the question of how this contract was terminated, whether by mutual consent or otherwise, was not given proper consideration although it would seem to be involved in passing on the effect of this contract. Such evidence as there is would seem to indicate that it was ended by mutual consent, and there is nothing to indicate anything to the contrary. The respondents rely solely on the claim that the $3,000 note was given as a down payment, and that it was payable in any event. The note was an intregral part of the contract. If the contract was ended by mutual consent it was all ended, including this note.

The part of the judgment ordering payment of the $3,000 note is reversed and the portion based upon the cross-complaint is affirmed. The purported appeal from the order denying a new trial is dismissed. The appellants to recover costs on appeal.

GRIFFIN, J., concurs.

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113 Cal.App.2d 763

HILL et al. v. HEARRON et al.

Civ. 8099.

District Court of Appeal, Third District,
California.

Oct. 21, 1952.

Hearing Denied Dec. 18, 1952.

Action for accounting with reference to partnership assets. The Superior Court, Siskiyou County, James M. Allen, J., entered judgment denying accounting, and plaintiffs appealed. The District Court of Appeal, Third District, Peek, J., held that provision for forfeiture, in event of default of partner, of all interests in partnership property of potato growing venture to which substanial assets had been contributed by defaulting partner, bore no reasonable relation to damages actually suffered, and provision would not be enforced, but defaulting partner would be granted an accounting.

Judgment reversed, and cause remanded.

1. Damages 🔑80(1)

A penalty for breach of contract should bear some rational relationship to its purpose, and cannot be upheld if it amounts to a forfeiture of money or property without regard to the actual damage suffered. Civ.Code, §§ 1670, 1671, 3275, 3294.

2. Damages ⚷80(1)
Partnership ⚷300

Where contract by which plaintiffs and defendants undertook potato growing partnership provided that plaintiffs were to furnish certain assets and the defendants others, and that default by either should result in forfeiture by defaulting partner of all interests in partnership property, and plaintiffs failed to furnish all items called for by contract, but did make substantial expenditures in part performance, forfeiture in accordance with contract bore no relation to actual damage suffered by defendants, and such provision could not be enforced against plaintiffs, but they were entitled to accounting of their interest in assets to time of termination of partnership.

◆

Barr & Hammond, Yreka, for appellants.

Charles Lederer, Alturas, and Herbert P. Welch, Lakeview, Or., for respondents.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment denying them relief in their action for an accounting of their alleged interest in the partnership previously entered into between themselves and defendants.

The evidence shows that on May 6, 1949 plaintiffs D. C. Hill and his wife and defendants John Hearron Jr. and wife entered into a partnership agreement for the purpose of growing potatoes during the 1949 crop season. According to the terms of the agreement land was to be leased and certain enumerated initial expenses were to be borne by each in order to get the crop in the ground; that is, plaintiffs were to advance the funds necessary for the purchase of seed potatoes and advance funds necessary for the purchase of the fertilizer while defendants were to advance the funds necessary to lease the land and get the crop in the ground. The agreement further provided that when the potatoes had been planted an accounting was to be had of all costs up to that time; that if either party had advanced more money than the other an adjustment would be made between them so that each would bear one-half of the expenses and thereafter each partner was to advance one-half of the costs of operation. Defendant John Hearron Jr. was to actively manage the operations and receive a salary for such services. Plaintiff D. C. Hill was to do the rogueing and certification of the potatoes for which he was to receive a reasonable wage. Additionally the contract provided that no money could be borrowed on behalf of the partnership nor could any liens be placed against the partnership property without the consent of both partners. Lastly the agreement provided:

> "If first partners or second partners or either of them should default in the terms of this contract then such defaulting partner shall forfeit all of his interest in said lease, also his or their interest in said crop of potatoes and the remaining partners shall immediately become the owner of said lease and said partnership property and business."

In accordance with the agreement, operations were commenced. Hill furnished the seed potatoes and fertilizer, charging the same against his account in another partnership in which he was interested. However, such costs were not actually paid until October 27, 1949 after the harvesting of the potatoes was completed. According to Hill's figures these items amounted to $8,666.75. Hearron Jr. who was entirely financed by his father, leased the land and paid for the planting at a cost of approximately $8,000. Pursuant to the terms of the agreement the parties met on July 26, 1949 to effect an adjustment of their accounts. Although no definite accounting was made at that time the parties appeared to have tentatively agreed that they were substantially even on the expenses to date, and for future expenses Hill advanced the sum of $2,000 which sum was thereafter matched by Hearron by advancements made during the months of August and September.

Prior to the commencement of the harvesting operations Hearron notified Hill that this work would cost approximately $12,000 and requested Hill to advance his share. Although promising to do so Hill failed to provide his share. However, subsequently he did furnish sacks to the approximate value of $1,800. As the result of Hill's failure in this regard Hearron's father put up the required additional money.

On October 5, 1949, following the completion of the harvesting Hearron gave notice to Hill that he had elected to declare a forfeiture of Hill's interest in the partnership under the provisions of the contract heretofore quoted. There is testimony that following this notice Hearron offered to return to Hill the sum of $3,011; this figure apparently represented the sum of $2,000 cash advanced by Hill at the time of their original accounting and the sum of $1,011 paid as freight on the seed potatoes and fertilizer. There was further testimony on behalf of defendants that if plaintiff Hill would advance his share of the harvesting expenses and produce receipts for his expenditures at the outset of the agreement defendants would allow him to continue to participate in the partnership.

The trial court found that the Hearrons had advanced the cash rental for the land and otherwise fully performed their part of the agreement; that the Hills had defaulted under the same and in particular that they had failed to account to the Hearrons for the amount of the purchase price of the seed, fertilizer and freight, and that they had failed to furnish any evidence that the same had actually been paid for by them. The court then found that up to October 5, 1949 plaintiffs had paid no money for these items nor advanced any money except the sum of $3,011, and had failed to advance their part of the harvesting expenses. In light of the record we have been unable to rationalize the amount so found to have been advanced by plaintiffs. The court further found that the Hearrons had invested the sum of approximately $8,000 representing the rental payment of $5,600 and $2,400 for labor, together with the necessary funds for harvesting the crop. The judgment which was entered was that plaintiffs take nothing, and that all moneys coming into the hands of Hearron Jr.'s father, who was previously appointed as trustee, should be paid over to defendants herein.

On appeal the Hills make three contentions: (1) That they had substantially performed their part of the contract and any failure on their part, if such there was, was occasioned by the Hearrons' prevention thereof; (2) if they were compelled to further perform, such performance was waived by respondents, and (3) that the particular provisions of the contract heretofore quoted, under the rule of this state, cannot be construed as to work a forfeiture of their interest.

There can be no question but that the terms of the contract clearly and unambiguously provide for a forfeiture if a breach of the terms thereof occurs. Also there can be no question but that appellants' failure to provide their share of the money necessary to harvest the crop was a material breach. Furthermore there appears to be sufficient evidence to warrant the finding that the breach was wilful under Civil Code, section 3275.

The question then, is whether, under the facts and circumstances, this court may give effect to the forfeiture provisions provided for in the contract between these parties. We conclude, in view of the latest pronouncements by the Supreme Court of this state on the subject, that it may not. In Freedman v. The Rector, 37 Cal.2d 16, 20, 230 P.2d 629, 631, it was held that while the vendee, who had wilfully breached his contract for the purchase of real property, was for that reason without the terms of Civil Code section 3275 and could not recover his down payment, less damages, caused by the breach thereunder, he could nevertheless obtain the same relief because "the damage provisions of the Civil Code together with the policy of the law against penalties and forfeitures provide an alternative basis for relief independent of section 3275."

The court there said, 37 Cal.2d at page 21, 230 P.2d at page 632:

> "To permit what are in effect punitive damages merely because a party has partially performed his contract before his breach is inconsistent both with section 3294 of the Civil Code limiting the right to exemplary damages and sections 1670 and 1671 dealing with liquidated damages. 'A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty.' (Citation.) Such penalties cannot reasonably be justified as punishment for one who wilfully breaches his contract. Not only does section 3294 of the Civil Code express the policy of the law against the allowance of exemplary damages for breach of contract regardless of the nature of the breach (citation), but if a penalty were to be imposed it should bear some rational relationship to its purpose. A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. * * *
>
> "Moreover, to deny the remedy of restitution because a breach is wilful would create an anomolous situation when considered with section 3369 of the Civil Code. That section provides that 'Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case * * *,' ". See also 25 S.C.L.R. 387; Crofoot v. Weger, 109 Cal.App.2d 839, 241 P.2d 1017.

It cannot be denied that if in this case, as in the Freedman case, enforcement of the forfeiture provisions of the contract be allowed, "money or property would be forfeited without regard to the actual damage suffered". 37 Cal.2d at page 22, 230 P.2d at page 632.

[1] Furthermore as noted above a penalty should bear some rational relationship to its purpose. As the court there said, 37 Cal.2d at page 22, 230 P.2d at page 632: "A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases."

[2] While that case was concerned with forfeiture in a vendor-vendee situation, the policy of the law against forfeitures and penalties, the damage provisions of the Civil Code, and the reasoning there adopted are equally applicable here. For those reasons we hold the forfeiture provision of this contract cannot be enforced without regard to the calculation of the damages actually caused by the breach.

Although, as previously noted, the contract herein gave to the nondefaulting partners the right to termination of same in the event of default, under the rule of cited cases the forfeiture provision was ineffectual. Therefore since plaintiffs had an interest in the assets of the joint venture at the time they were acquired and since their partnership interest therein continued until the time of the cancellation of the agreement, then, as between the parties, that interest in the partnership property still exists notwithstanding the termination of the agreement. As stated in Martin v. Burris, 57 Cal.App. 739, 748, 208 P. 174, 178: "The cancellation of the contract did not in any manner affect the rights of either party in the assets theretofore acquired."

Here, however, the trial court strictly enforced the forfeiture clause and in doing so took no evidence nor made any finding concerning damages, nor did the court find that it would be impracticable or extremely difficult to ascertain such damages. To the contrary the court inferentially determined, as evidenced by its memorandum opinion, that since the forfeiture clause was absolute, no accounting was necessary.

From what has heretofore been said it follows that plaintiffs were entitled to an accounting of their interest in the assets of the joint venture at the time of the termination of the agreement, subject to whatever damage respondents suffered by reason thereof.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

SCHOTTKY, J. pro tem., and ADAMS, P. J., concur.

Hearing denied; SCHAUER, J., dissenting.

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113 Cal.App.2d 795

REMBOLD v. CITY & COUNTY OF SAN FRANCISCO.

Civ. 14942.

District Court of Appeal, First District, Division 2, California.

Oct. 23, 1952.

Hearing Denied Dec. 18, 1952.

Action by a pedestrian against a municipal corporation for personal injuries sustained in a fall on a sidewalk. The Superior Court, City and County of San Francisco, Foley, J., entered judgment granting a nonsuit and pedestrian appealed. The District Court of Appeal, Goodell, J., held that the allegation of the complaint that plaintiff duly filed her claim with defendant city in accordance with law was not controverted and was therefore admitted by the defendant, thus leaving no issue on that subject.

Reversed.

1. Pleading 🔑1

Pleading is used to limit the issues and narrow the proofs.

2. Pleading 🔑377

Fact allegations not controverted in the answer are not in issue and no evidence is needed to prove their existence.

3. Pleading 🔑380

Evidence impertinent to the issues presented by the pleading is immaterial and inadmissible.

4. Municipal Corporations 🔑742(4)

Though claim filed with city was admissible for the purpose of impeaching plaintiff's testimony respecting the locus of plaintiff's fall, it was not admissible to prove that it was itself defective in form or content where that issue was closed by defendant's failure to controvert an allegation of the complaint that the claim was filed in accordance with law. Code Civ. Proc. § 459.

5. Pleading 🔑205(2)

Though allegation that plaintiff filed claim against city in accordance with law was a conclusion of law it would have been invulnerable to a general demurrer which does not reach defects in matters of form.

◆

Philander Brooks Beadle, San Francisco, Shapro & Rothschild, San Francisco, for appellant.

Dion R. Holm, City Atty., City & County of San Francisco, Lawrence S. Mana, Deputy City Atty., San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from a judgment entered on a nonsuit.

The action is one for personal injuries sustained by appellant in a fall on a sidewalk in San Francisco.

The claim, required by law to be filed before suit, contains the statement that the accident occurred on "* * * that certain street known as 18th Avenue, particularly the east sidewalk thereof near the intersection of the east side of *16th* Avenue and the north side of Geary Boulevard; * * *" (Emphasis added).

The motion for nonsuit was not based on any failure to prove that the sidewalk was defective or that the authorities had no knowledge or notice of the defect, or any such matter of substance, but, as stated by counsel in presenting their motion, it was based "in particular in regard to the claim that is in evidence. We believe it is defective on the ground that it doesn't sufficiently and adequately describe the place where the accident occurred."

Paragraph XIII of the complaint reads as follows: "That plaintiff duly filed her claim with the defendant City and County of San Francisco in the manner and within the time provided by law."

In its answer the City made categorical denials of eight paragraphs of the complaint; two other paragraphs were denied for lack of information or belief, and three were wholly undenied. One of the three deals with fictitious defendants, another with public streets (which could not possibly be denied) and the third (par. XIII) is the one in question which presumably would have been denied had the City felt there was any valid basis for its denial.

Appellant contends that the failure to deny this allegation left no issue to be tried on that subject, and that it rendered erroneous the order granting the nonsuit based solely on the ground that the claim was insufficient or inadequate in its description of the place of the accident.

[1–3] The rules on this subject are restated in Fuentes v. Tucker, 31 Cal.2d 1, 4–5, 187 P.2d 752, 754, as follows: "One of the functions of pleadings is to limit the issues and narrow the proofs. If facts alleged in the complaint are not controverted by the answer, they are not in issue, and no evidence need be offered to prove their existence. Travelers' Ins. Co. v. Byers, 123 Cal.App. 473, 482, 11 P.2d 444; Code Civ.Proc., §§ 462, 588, 1868, 1870 subds. (1), (15); see I Wigmore on Evidence, 3d Ed.1940, p. 9, § 2. Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence. [Citations.] It follows, therefore, if an issue has been removed from a case by an admission in the answer, that it is error to receive evidence which is material solely to the excluded matter."

The case of Gnesa v. City and County of San Francisco, 40 Cal.App.2d 640, 642, 105 P.2d 376, 378 is directly in point. There it was alleged "That on December 16, 1938 plaintiff filed a duly verified claim with the Controller of said City and County setting forth the claim sued upon here", which allegation was admitted by the answer, and this court held that "The settled rule is that, in absence of * * * statutory requirements, matters admitted in the pleadings need not be proved. Code Civ.Proc. sec. 462; 21 Cal.Jur., p. 155."

[4] Respondent attempts to distinguish that case on the ground that "In the instant situation the evidence introduced in the course of the presentation of the plaintiff's case indicated that the claim as filed was not in compliance with the statutory requirement." Plaintiff testified that she fell on 18th Avenue, not on 16th. On cross-examination she was confronted with the claim and adhered to her earlier testimony. The claim itself was then introduced in evidence by the City without objection. Plaintiff of course had not offered it, since there was not issue respecting it. It is true the claim went into evidence "in the course of the presentation of the plaintiff's case" but clearly the City would have had no way of getting it before the court except in connection with plaintiff's cross-examination. In Dressler v. Johnston, 131 Cal.App. 690, 695, 21 P.2d 969, 971, the court said: "A fact which is admitted by the pleadings is controlling upon that issue. It requires no evidence to support it. *It forbids the consideration of evidence which tends to refute the stipulated fact.*" (Emphasis added.) While the claim might have been used for impeachment respecting the place where plaintiff fell, it could not be invoked to prove by its own internal evidence that it was defective in form or content since there was no such issue. Under the authorities the court simply could not consider it in that connection. Fuentes v. Tucker, supra; Bloss v. Rahilly, 16 Cal.2d 70, 77, 104 P.2d 1049; United Air Services, Ltd. v. Sampson, 30 Cal.App.2d 135, 146, 86 P.2d 366; Driver v. International, etc., Ass'n, 54 Cal.App.2d 614, 620, 129 P.2d 771.

Repondent also attempts to distinguish the Gnesa case by pointing out that "The allegation of the filing of the claim in the Gnesa case was one definitely of fact, setting forth the date of the filing of the claim, the fact of the verification of the claim, the officer with whom the claim was filed, and the nature of the claim." This argument is advanced as part of respondent's contention that "The allegation of the filing of the claim was not well pleaded and * * was not admitted by the failure * * * to deny it."

[5] There is no substantial difference between the "claim" allegation in the two cases. It may be conceded that paragraph XIII is a conclusion of law. Even so, the City was content to take it as it was, without demurring. The allegation even in conclusional form would be invulnerable to a general demurrer. The settled rule is stated in 21 Cal.Jur. pp. 108–9 as follows: "A general demurrer * * * does not reach mere defects in allegations, defects in matter of form—as that the essential facts appear only inferentially, or as conclusions of law, or by way of recital." The following statement in Green v. Darling, 73 Cal. App. 700, 704, 239 P. 70, 71, is peculiarly applicable to this case: "The objection that an essential fact appears in the pleading only in the form of a conclusion of law cannot be reached by general demurrer. Santa Barbara v. Eldred, 108 Cal. 294, 41 P. 410. *In the instant case no demurrer was filed, and it is therefore even more apparent that this criticism of the complaint comes too late when raised for the first time on appeal.*" (Emphasis added.) See, also, Cullinan v. Mercantile Trust Co., 80 Cal. App. 377, 383, 252 P. 647.

Moreover, § 459, Code Civ.Proc. provides: "* * * In pleading the performance of conditions precedent under a statute * * * it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part required thereby; if such allegations be controverted the party pleading must establish on the trial the facts showing such performance." See Ley v. Babcock, 118 Cal. App. 525, 5 P.2d 620; Bank of America Nat. Trust & Savings Ass'n v. McLaughlin Land & Livestock Co., 40 Cal.App.2d 620, 105 P.2d 607. In Blumer v. Kirkman Corp., 38 Cal.2d 480, 485, 241 P.2d 17, these two cases are cited with approval.

And finally it might be observed that at the close of plaintiff's case (apparently because a juror was ill) counsel stipulated to proceed without a jury. If the trial had gone on to a judgment on the merits and the court had determined in its findings of fact and conclusions of law that the claim was defective, contrary to the admission, such finding would have been "outside the issues and erroneous." Bloomquist v. Haley, 204 Cal. 251, 252–253, 268 P. 367, 368; citing Welch v. Alcott, 185 Cal. 731, 198 P. 626; see, also, Lucy v. Lucy, 22 Cal. App.2d 629, 635, 71 P.2d 949. Nevertheless a similar determination was made in this case when the court granted this nonsuit. There is no escape from the conclusion that it was error to do so.

Since, as we have seen, there was no issue at the trial as to the sufficiency of the claim, then obviously there can be no issue on appeal on that question, Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 583, 186 P.2d 748, and no need to examine or discuss respondent's points or authorities under that head.

The judgment is reversed.

NOURSE, P. J., and DOOLING, J., concur.

113 Cal.App.2d 857

PEOPLE v. FALK.

Cr. 4822.

District Court of Appeal, Second District, Division 1, California.

Oct. 27, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Ellsworth Meyer, J., of possession of marijuana, and from the verdict, sentence and order denying motion for new trial, defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Purported appeal from verdict and sentence dismissed, and judgment and order denying motion for a new trial affirmed.

1. Criminal Law 🔑1023(10)

Purported appeal from verdict and sentence was required to be dismissed, since no appeal therefrom was authorized. Pen. Code, § 1237.

2. Criminal Law ⚿1159(2)

Before the District Court of Appeal is authorized to set aside judgment of conviction on ground of insufficiency of evidence, it must be made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

3. Criminal Law ⚿1159(2)

Appellate courts are not authorized to review evidence except where on its face it may justly be held that it is insufficient to support ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. Code Civ.Proc. §§ 1847, 2061.

4. Poisons ⚿9

Evidence was sufficient to sustain conviction for possession of marijuana. Health and Safety Code, § 11500.

5. Poisons ⚿9

Where there was testimony of police officer that defendant admitted that marijuana found in purse in apartment of defendant belonged to her, fact that she testified that other persons had equal facility of access to the apartment could afford defendant no relief in prosecution for possession of marijuana. Health and Safety Code, § 11500.

◆

Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

Defendant was accused in an information filed by the District Attorney of Los Angeles County with a violation of Health and Safety Code, § 11500, in that she had in her possession cannabis sativa, commonly known as marijuana.

Following the entry of a plea of not guilty the cause proceeded to trial before a jury which found her guilty as charged. Following denial of a motion for a new trial judgment was pronounced.

[1] Defendant prosecutes this appeal "from the judgment and verdict * * * and from the denial of defendant's motion for a new trial * * * and from the sentence rendered * * *." Since no appeal is authorized from the verdict and sentence, the purported appeal therefrom must be dismissed. Penal Code, § 1237; People v. Tallman, 27 Cal.2d 209, 215, 163 P.2d 857.

The factual background surrounding this prosecution may be thus epitomized: On the night of July 25, 1951, Police Officer Diaz along with other officers was admitted to Apartment 8 in an apartment building located at 1144 South Sierra Bonita, by one Jerrott Shepherd. A few minutes later, the defendant entered the apartment. The officers searched the apartment, and on the top shelf of a closet, among other articles, Officer Diaz found a red purse containing a brown paper partially smoked cigarette containing a green leafy substance which was, in the opinion of a chemist who examined it, marijuana.

Officer Diaz asked the defendant if anybody lived in the apartment other than herself, and she stated that no one else did. He asked her if the partially burned cigarette which he had found belonged to her, and she said that she did not know anything about it. He asked her how she accounted for its being in her purse, and she said, "Well, if it is in my purse it is mine." Officer Kennedy asked her if she smoked marijuana, and she said that she did, and she started doing so about two years previously. She said that she had not used the purse for about a year.

Sworn as a witness in her own behalf, the defendant testified that she had been living at the address where she was arrested for about a month prior to the arrest. On the night of July 25th, Officer Diaz showed her a red purse and asked if it was hers. She told him that it was, and he pulled the pocket of the purse back and showed her the brown cigarette. He asked her what it was, and she told him that she didn't know. She had had the purse for about two years, but had not used it since the previous Christmas, when she had been given a new red bag. She had moved three times since the previous Christmas, and although she lived alone most of the time, girl friends would stay with her sometimes, and would sometimes stay in her apartment when she was gone. They borrowed her clothes, and one Ellen Stout had used the red bag in June. Defendant further testified that Officer Diaz had asked her about the cigarette, "wanting her to say that it was hers", but she told him it was not and that she didn't know anything about it. He asked her to suggest some one to whom it could belong, and she told him she could not think of anybody. She said, "It is in my bag." That he asked her about smoking marijuana and she told him that she did not have any marijuana; that she did not have any use for it, and wouldn't have it in her possession. That she did not smoke marijuana, and she told Officer Diaz that she did not. That the cigarette was not hers she did not put it in the bag, and she did not know that it was there.

Appellant's sole contention on appeal is that the evidence is insufficient to establish knowledge of the presence of the marijuana in her apartment as required by the statute and judicial decisions interpreting it.

The instant case is controlled by the case of People v. Gory, 28 Cal.2d 450, at page 455, 170 P.2d 433, at page 436, wherein our Supreme Court exhaustively reviewed the questions of possession and knowledge, and thereupon said, "The distinction which must be drawn, from a reading of the foregoing authorities, is the distinction between (1) *knowledge of the character of the object and the unlawfulness of possession thereof* as embraced within the concept of a specific intent to violate the law, and (2) *knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute. It is 'knowledge' in the first sense which is mentioned in the authorities as being immaterial but 'knowledge' in the second sense is the essence of the offense."

[2] Before we would be authorized to set aside the judgment and order in this cause on the ground of insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * *" People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, that appellant had knowledge of the presence of the marijuana "as embraced within the concept of 'physical control with the intent to exercise such control'". People v. Gory, supra, 28 Cal.2d at page 455, 170 P.2d at page 436, which is the very essence of the offense charged against her.

[3, 4] Appellant's argument that she had no such knowledge disregards the testimony of Officers Diaz and Kennedy that she stated in response to a question propounded by them, "Well, if it is in my purse, it is mine." Appellant also told the officers that she resided in the apartment alone and that she had been smoking marijuana for about two years. True, appellant at the trial denied having made the aforesaid statements, but appellate courts are not authorized to review evidence except where on its face it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. Furthermore, the legislature has ordained that the jury is the exclusive judge of the credibility of witnesses, Code Civil Procedure, § 1847, and is the judge of the effect and the value of evidence addressed to it, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates. Code Civ.Proc. § 2061. And, as a necessary corollary of the rules above noted, the jury in this case was authorized, if it conscientiously felt warranted in so doing after full and fair consideration thereof, to reject the testimony of appellant which was contradictory to that given by the officers. The testimony of the officers if believed by the jury, as presumptively it was, sufficiently established that the appellant had knowledge of the nature of the cigarette, as well as of its presence in her apartment. People v. Casas, 77 Cal.App.2d 255, 257, 175 P.2d 19; People v. Hoff, 84 Cal.App.2d 398, 400, 190 P.2d 616; People v. Bigelow, 104 Cal.App.2d 380, 385, 231 P.2d 881.

[5] Since there is testimony that appellant admitted the marijuana belonged to her, the fact that she testified that other persons had equal facility of access to the apartment in question can afford her no relief. People v. Gallagher, 12 Cal.App.2d 434, 436, 55 P.2d 889.

For the foregoing reasons, the attempted appeal from the verdict and sentence is dismissed. The judgment and the order denying defendant's motion for a new trial are and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

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113 Cal.App.2d 746

PEOPLE v. AHERN.

Cr. 2822.

District Court of Appeal, First District,
Division 1, California.

Oct. 21, 1952.

Rehearing Denied Nov. 5, 1952.

Hearing Denied Nov. 17, 1952.

Defendant was convicted in Superior Court, City and County of San Francisco, Milton D. Sapiro, J., of furnishing a marijuana cigarette to a minor, in violation of Health and Safety Code, § 11500, and he appealed. The District Court of Appeals, Fred B. Wood, J., held that where evidence tended to prove that one of state's witnesses was concerned in commission of the crime, instruction as to accomplices and accomplice testimony was necessary.

Judgment reversed.

1. Criminal Law ⇨780(2)

Where evidence in prosecution for furnishing marijuana cigarette to a minor tended to prove that one of state's witnesses was concerned in commission of crime, instruction as to accomplices and accomplices' testimony was necessary. Health and Safety Code, § 11500; Pen.Code, §§ 31, 1111.

2. Criminal Law ⇨742(2)

A disputed question of fact as to whether witness was accomplice is for jury.

3. Criminal Law ⇨824(7)

Where disputed question of fact arises as to whether witness was an accomplice, trial court has duty, of its own motion and without request by defendant, to instruct jury with respect to accomplices and their testimony. Code Civ.Proc. § 2061(4).

4. Criminal Law ⇨1044

Where information charging defendant with furnishing a marijuana cigarette to one person was amended, on day of trial, to add additional count charging such furnishing to another, upon which count defendant was convicted, defendant, who objected to such amendment but who failed to move to set aside information on ground that he had not been legally committed by magistrate in respect to offense charged in second count, was precluded from raising such objection on appeal. Pen.Code, §§ 995, 996; Health and Safety Code, § 11500.

5. Indictment and Information ⇨139

Motion to set aside information on ground that defendant had not been legally committted by magistrate must be made prior to trial and before entry of plea, the trial court having power to allow plea to be withdrawn for purpose of hearing and determining such motion. Pen.Code, §§ 995, 996.

Thomas E. Feeney, William S. Sparks, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthurst, Deputy Atty. Gen., John T. Rudden, Jr., Asst. Dist. Atty., of San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant has appealed from the judgment entered upon his conviction of violating section 11500 of the Health and Safety Code, furnishing a marijuana cigarette to one Patricia McGuire, a minor.

The principal issues are (1) asserted error in the refusal of certain instructions requested by the defendant, and (2) asserted error in permitting an amendment of the information to add a count charging commission of the offense for which the defendant now stands convicted.

[1-3] (1) *The defendant requested and the court refused the following cautionary instructions concerning accomplices and their testimony*: "You are instructed that an accomplice is one who has been concerned in the commission of a crime, whether he or she has directly committed the act or aided and abetted in its commission, and is liable to prosecution for the identical offense charged against the defendant," and "You are further instructed that, as a matter of law, it is your duty as jurors to view the testimony of an accomplice with distrust."

Proper instructions on this subject were necessary in view of testimony of the prosecution witness, Patricia McGuire, tending to prove that one of the other witnesses against defendant aided and abetted him in the commission of the alleged offense. Patricia testified that Darlene Healy was with defendant; that Patricia went up to defendant and asked him for a "joint" (meaning a marijuana cigarette); he said "No"; then she started begging him, saying "please," and then "Darlene says, 'Go ahead,' so he says, 'O.K.' " and gave her a marijuana cigarette. Patricia then lighted it, handed it to Darlene who smoked it some and in turn handed it to the defendant who took a couple of puffs and returned it to Patricia who finished it. Twenty to thirty minutes later the police raided the place. They found seven marijuana cigarettes on Darlene. She testified that she had smoked marijuana about 30 or 40 times, and that in the presence of defendant and Patricia she smoked part of a marijuana cigarette which defendant gave to Patricia that night; that Patricia asked defendant for a cigarette and he said "No," but when Patricia asked a second time, he said "All right"; denied that she, Darlene, said anything, denied that she told defendant to give Patricia one; and said that she knew the defendant and was engaged to marry him.

Here we have evidence tending to prove that Darlene, one of the witnesses for the state, was "concerned in the commission" of the crime, and "aided and abetted in its commission" as those terms are used, in defining "principals in any crime", in section 31 of the Penal Code. If one of the principals, she would be subject to prosecution for the offense with which defendant was charged. That would make her an accomplice as defined in the concluding sentence of section 1111 of the Penal Code. See People v. Shaw, 17 Cal.2d 778, 799–800, 112 P.2d 241; People v. Wallin, 32 Cal.2d 803, 806–807, 197 P.2d 734; People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; and People v. Albrexstondare, 71 Cal. App. 339, 342–345, 235 P.2d 87. The jury are "to be instructed by the court on all proper occasions * * * That the testimony of an accomplice ought to be viewed with distrust * * *." Code of Civ.Proc. § 2061(4). Such "instructions are necessary in a proper case and the failure so to instruct may be reversible error." People v. Dail, 22 Cal.2d 642, 656, 140 P.2d 828, 836. Here there was a disputed question of fact whether Darlene was an accomplice. Accordingly, the requested instructions under discussion properly left that question to the determination of the jury. People v. Griffin, 98 Cal.App.2d 1, 22, 219 P.2d 519. The second of the two requested instructions ("as a matter of law, it is your duty * * * to view * * * with distrust") is more emphatic than the statute calls for ("ought to be viewed with distrust"). However, in a criminal case, it is the duty of the court of its own motion, without any request by the defendant, to instruct the jury with respect to accomplices and their testimony. People v. Crain, 102 Cal.App.2d 566, 582, 228 P.2d 307, and cases cited.

Defendant took the witness stand and denied having taken any part in the alleged offense. We have examined the record and can not say with assurance that the jury would have given the same verdict had proper cautionary instructions concerning testimony of an accomplice been given. We conclude that the error was prejudicial and that the judgment should be reversed.

[4, 5] (2) *The assertion of error in permitting amendment of the information*

is an objection which defendant is precluded from making upon this appeal. The complaint before the magistrate charged a violation of section 11500 of the Health and Safety Code, furnishing a marijuana cigarette to one Nancy Inocencio. During the preliminary examination evidence was given also of the furnishing of a marijuana cigarette to Patricia McGuire. The written order of the magistrate bound the defendant over to the superior court upon the Inocencio charge only, did not mention the McGuire charge. The information when filed charged only the furnishing of a cigarette to Inocencio. After four days oral notice and upon the day set for commencement of the trial, the district attorney moved and was permitted to amend the information by adding an additional count charging the furnishing of a marijuana cigarette to McGuire. Upon that occasion, defendant objected to the amendment upon the ground that the evidence concerning the furnishing of the cigarette to McGuire was improperly admitted at the preliminary examination before the magistrate, not within the issues framed by the complaint. The trial court overruled the objection and permitted the amendment. Defendant then asked for a continuance which the court denied, stating that if at any time during the trial defendant should require a continuance, the court would take a request therefor into consideration at that time. Defendant then pleaded not guilty and the trial commenced. Defendant did not at any time later during the trial request a continuance and has not shown he was prejudiced by the continuance which the court conditionally denied him. At no time did he in the court below move, as authorized by section 995 of the Penal Code, to have the amended information or the new count added by that amendment set aside on the ground that he had not been legally committed by a magistrate in respect to the offense charged by that count. In view of such failure "the defendant is precluded from afterwards taking" that objection; Pen.Code, § 996. Defendant argues that his objection to the amendment of the information is the substantial equivalent of the making of a motion to strike. We may assume that his objection, though worded somewhat differently, was that he had not been legally committed by a magistrate on the second count because that count charged an offense unrelated to and unconnected with the transaction which was the basis for the commitment order. But section 995 expressly requires the setting aside of an information upon such a ground "by the court in which the defendant is arraigned, upon his motion". That is interpreted to mean that he must make the motion or be precluded by section 996 from afterwards making the objection. His judgment of conviction rests upon the evidence adduced at the trial and the verdict of the jury, not upon the order of commitment nor upon the proceedings before the magistrate. People v. Harris, 219 Cal. 727, 729–730, 28 P.2d 906, and cases cited. The motion must be made prior to the trial and before the entry of a plea, the trial court having power to allow a plea to be withdrawn for the purpose of hearing and determining such a motion. People v. Linton, 102 Cal.App. 608, 611, 283 P. 389. See, also, People v. Magee, 60 Cal.App. 459, 462, 213 P. 513; People v. Brown, 72 Cal.App.2d 717, 719, 165 P.2d 707; People v. Egan, 73 Cal.App.2d 894, 897, 167 P.2d 766; People v. Kellogg, 6 Cal.2d 448, 454, 57 P.2d 1305. Defendant suggests it would be over-technical to hold him to the requirements of section 995 in view of the objection he interposed to the amending of the information. The answer is that his objection is technical and he has failed to avail himself of the means accorded him by the law to assert that objection and make it effective.

It is not necessary to consider other points urged by defendant for a reversal.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

113 Cal.App.2d 813

PEOPLE v. FLORES.

Cr. 2367.

District Court of Appeal, Third District, California.

Oct. 23, 1952.

Defendant was convicted in the Superior Court, Merced County, R. R. Sischo, J., of petty theft and burglary, and he appealed. The District Court of Appeal, Schottky, J. pro tem., held that in absence of objections at trial to questions asked by court of witnesses, defendant was not entitled to make an assignment of error for the first time on appeal.

Judgment affirmed.

1. Criminal Law 🔑1035(3)

When a defendant fails to object at the trial to questions asked by the court of witnesses, he is not entitled to make an assignment of error for the first time on appeal.

2. Criminal Law 🔑1166½(12)

In prosecution for petty theft and burglary, involving sewing machine which was admitted to have been found in trunk of defendants' automobile, question put by court to prosecuting attorney, who was attempting to identify machine, as to whether he had any witness on stand yet that found it in the automobile, was not prejudicial error. Pen.Code, §§ 459, 484.

3. Criminal Law 🔑1166½(12)

In prosecution for petty theft and burglary, where court instructed prosecution witness, who was being cross-examined, "go ahead, you are doing all right", comment that he was doing all right might well have been omitted, but, in view of fact that defendant's counsel thereafter instructed witness to go ahead, it resulted in no prejudice to defendant. Pen.Code, §§ 459, 484.

4. Criminal Law 🔑1166½(12)

In prosecution for petty theft and burglary where remark by court, that intent with which appellant's co-defendant entered store was answered by fact that he took sewing machine, was followed by statement that this was for jury to decide also, trial court intended to and did indicate that it was for jury to decide issue of intent, and, in view of fact that jury was subsequently fully instructed, no possible prejudice could have resulted to appellant. Pen. Code, §§ 459, 484.

5. Criminal Law 🔑404(4)

In prosecution for petty theft and burglary involving sewing machine which was found in trunk of defendants' automobile, a movie camera and some statuette horses found in the trunk at the same time were properly received for the purpose, as stated at the time by the court, of showing what was in the automobile. Pen.Code, §§ 459, 484.

6. Criminal Law 🔑1036(1)

In prosecution for petty theft and burglary, where detective testified without objection that he had followed defendant for three months after date of alleged crime and that both defendant and his co-defendant were unemployed and defendant's counsel brought out additional facts on cross-examination, defendant could not raise question of inadmissibility for first time on appeal. Pen.Code, §§ 459, 484.

7. Criminal Law 🔑1144(15), 1170½(6)

In prosecution for petty theft and burglary where objection to question put by prosecuting attorney to defendant's co-defendant was sustained, it was to be assumed that the jury in following their instructions disregarded testimony to which the objection was sustained, and, hence, the putting of the question was not prejudicial misconduct which would deny defendant a fair and impartial trial. Pen.Code, §§ 459, 484.

8. Criminal Law 🔑1036(1)

In prosecution for petty theft and burglary, question put by prosecuting attorney to defendant's co-defendant, which was not objected to at the trial, could not be objected to for first time on appeal. Pen.Code, §§ 459, 484.

9. Criminal Law 🔑372(5, 10)

In prosecution for petty theft and burglary, question put to co-defendant, who had already admitted the theft by means of "shoplifting", as to whether he had ever shoplifted anything else in such manner, was proper to ascertain if that was part of the plan of operation. Pen.Code, §§ 459, 484.

10. Criminal Law ⚷1186(4)

In prosecution for petty theft and burglary, where record pointed conclusively to defendant's guilt, it could not be held, even if defendant were correct about errors in the trial, that such errors resulted in a miscarriage of justice. Pen.Code, §§ 459, 484; Const. art. 6, § 4½.

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John L. Brannely and Anthony J. Scalora, Sacramento, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment entered upon a verdict finding appellant guilty of petty theft and burglary.

The information upon which appellant was tried and convicted was in two counts, the first count charging him with a violation of section 484 of the Penal Code in that on or about October 29, 1951, in Merced County, he feloniously took a portable Singer sewing machine, the personal property of Singer Sewing Machine Company, of the value of $149.50; that previously, on May 31, 1940, he had been convicted of grand theft, a felony, in the Superior Court of Sacramento County and served a term in a penal institution therefor. Count 2 of said amended information charged him with a violation of section 459 of the Penal Code in that on or about October 29, 1951, in the County of Merced, he wilfully entered the shop and building owned and occupied by the Singer Sewing Machine Company with the intent to commit theft.

One Louis Argandar was charged in a separate information with the same offenses. Appellant entered a plea of not guilty to both counts, and Argandar pleaded guilty to Count 1 and not guilty to Count 2. Both admitted the prior convictions. The two cases were consolidated for trial.

Appellant does not question the sufficiency of the evidence to support the judgment, but urges two grounds for reversal: First, that the trial court was guilty of prejudicial error; and second, prejudicial misconduct by the deputy district attorney. Before discussing these contentions we shall summarize briefly the evidence as shown by the record.

The evidence showed that at about 2:30 in the afternoon of October 29, 1951, appellant Flores and his co-defendant Argandar entered the Singer Sewing Machine shop located at 629 Seventeenth Street, Merced, California, where appellant asked to see some vacuum cleaner attachments; he was taken to the rear of the store, and Mrs. Dunn, the saleslady who conducted the demonstration, which took some 10 to 15 minutes, stood with her back towards the front of the store, while appellant stood facing her and the front of the store. During this time defendant Argandar remained at the front of the store where he admittedly took a portable sewing machine out of the display window, placed it under his coat, and left the store. Another employee, Barbara Michalek, was working at the button counter at the front of the store, but she did not follow Argandar's actions. Appellant Flores told Mrs. Dunn that he was unable to make the purchase because he did not have the money, but would return the following day; he then returned with her to the front of the store, and as appellant left, Mrs. Dunn noted that Argandar was no longer in the shop. One John Bradley looked into the display window as he was passing the store and observed Argandar taking the machine; he also testified that he observed Argandar leave the store in the company of another man. Bradley thereupon entered the store and alerted the women as to the taking of the machine; they notified the police, and about 20 minutes after the complaint was received Flores and Argandar were picked up by the police, in the near vicinity of the store. Defendants, in response to questioning, alleged that they were hitch-hiking to Fresno. On the way to the police station, defendants were identified as the two men who had been in the store earlier, but they denied any knowledge as to the missing sewing machine. At the police station, both men again denied knowledge of the machine, asserted that they were hitch-hiking to Fresno, and that they had no car. Flores reasserted his purpose in entering the store, and Argandar admitted being there with Flores, for no particular purpose. They were released from custody, and though they briefly escaped the surveillance of the officers assigned to follow them, they were soon brought under watch again, and at the outskirts of Merced Argandar was observed alighting from a taxicab and entering a parked 1939 Buick tudor sedan in which Flores was at the wheel. The Buick drove off towards Madera but was stopped by the police, who examined the trunk and found the sewing machine, which was identified by its serial number as the one taken from the store, and three miniature metallic horses, plus a kodak movie camera to which was still attached a price tag of $44.50. The men were arrested. Bail for both was put up by appellant's brother. Subsequent to their arrest they occupied apartments in the same building in Fresno and they were seen together numerous times.

Both Flores and Argandar testified that they had not known each other prior to this incident, although they had seen each other around in Fresno. Appellant Flores' story was that he had been hitch-hiking from Stockton on that day when Argandar picked him up. They parked the car in Merced where they intended to have some refreshments; as they were going up the street they passed the Singer Sewing Machine shop, appellant saw a vacuum cleaner in the window which reminded him of attachments he wanted for his mother's vacuum cleaner. He did not tell Argandar why he was going in the store, but they went in and the above-described events occurred. Appellant admitted having some $22 to $23 in his possession when he stated he could not afford the attachments. When he saw that Argandar had already left the store he assumed he would find him by the car, and did in fact meet Argandar a short distance therefrom, whence they went into a drug store for a soda. When returning to the car they were apprehended. Flores knew nothing of the theft until after they were dismissed from the police station, at which time Argandar told him. When they left the police station both defendants entered a cab, which Flores directed to the bus depot, it being his intention to complete the trip to Fresno by bus. Flores left Argandar and the cab at the depot, but when appellant learned that the bus would not leave for an hour, he decided to return to Argandar's car and drive it back, which Argandar had told him he could do since Argandar intended to leave the car in Merced, hitch-hike to Fresno, and return later to pick up the car. Flores thought Argandar was leaving the car in Merced since Argandar denied to the police that he had a car. Appellant further testified that when he met Argandar on the highway it was unexpected, since he had planned to return the car in Fresno. He also said he did not know that the stolen sewing machine was in the trunk of the car. Appellant Flores denied telling the police, "You are trying to pin a rap of theft on me on that sewing machine," because he did not know about it at the time; he also denied that the police had told him that a machine had been taken at the time he was identified by the saleslady in the Singer shop. Argandar's testimony corroborated Flores', and he also contended that he had purchased the camera and statuettes from a man in Stockton for the sum of $17.

Appellant contends that the trial judge improperly questioned witnesses, made improper remarks, erred in admitting statements of police officers, erred in admitting before the jury testimony and exhibit of the movie camera and the statuettes, and erred in admitting the testimony of one Officer Demes of the Narcotics Division of the Fresno District Attorney's office concerning the actions and conduct of the two defendants after the date of the burglary.

Appellant asserts "that the trial judge entered very actively into the conduction of the trial of the People's case, and that the trial court, in many instances, figuratively shed the judicial robe, descended from the bench and joined shoulder to shoulder with the Deputy District Attorney in extensive examination of witnesses, as well as extended cross-examination of the defendant Flores." Appellant then proceeds to set forth a number of instances appearing in the record which he contends prejudiced him in the eyes of the jury and prevented him from having a fair trial. The record shows that appellant was represented at the trial by an able attorney of many years' experience, a former district attorney of Merced County, and that none of the questions asked by the court and none of the remarks of the court which are now so sharply criticised by appellant's present counsel, were objected to, or any exception thereto taken, by said former counsel.

[1] It is a well settled rule that when a defendant fails to object at the trial to questions asked by the court of witnesses, he is not entitled to make an assignment of error for the first time on appeal. People v. Savage, 66 Cal.App.2d 237, 152 P.2d 240; People v. Boggs, 12 Cal.2d 27, 82 P.2d 368. Nevertheless, we have examined the entire record with great care and are unable to say that the judge who tried the case transgressed the proper limits of judicial discretion in essaying to elicit from the witnesses all of the truth as to matters testified to by them in response to the questioning by counsel. Our attention has not been called to any question asked by the trial judge which was properly subject to any objection other than that it was being asked by the court instead of by counsel, and this being so, it is difficult to understand how the interrogation by the court could have constituted prejudicial error.

The following language from People v. Golsh, 63 Cal.App. 609, at page 614, 219 P. 456, at page 458, is apropos:

> "The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished, when a few questions asked from the bench might elicit the truth. It is his primary duty to see that justice is done both to the accused and to the people. He is, moreover, in a better position than the reviewing court to know when the circumstances warrant or require the interrogation of witnesses from the bench. As was said by the Georgia Court of Appeals in Hart v. State, 14 Ga.App. 364, 80 S.E. 909: 'While great caution should be used in its exercise, the trial judge has the right, in his discretion, to question the witnesses during the progress of a trial, in order to elicit the truth, and this discretion will not be controlled except where it appears that the manner in which the judge exercised his right tended unduly to impress the jury with the importance of the testimony elicited, or would be likely to leave the jury to suppose that the judge was of the opinion that one party rather than the other should prevail in the case.' See, also, People v. Hunt, 26 Cal.App. 514, 147 P. 476."

See, also, People v. Yuen, 32 Cal.App.2d 151, 159, 89 P.2d 438, 90 P.2d 291.

Appellant next contends that the trial judge made improper statements and comments which prejudiced appellant and amounted to prejudicial misconduct. However, the record shows that appellant's counsel at the trial did not assign any of said comments as misconduct or ask that the jury be instructed to disregard them, so it is evident that said counsel did not regard them as prejudicial. Furthermore, it is the invariable custom of trial judges to tell the jury in its final instructions that the court has not intended by any statement or expression to indicate any opinion as to the guilt or innocence of the defendant.

[2] The first instance of asserted improper statement by the court referred to by appellant occurred when the district attorney made an offer to introduce the sewing machine for identification. The following appears in the record:

> "The Court: Well, who is the officer here, if anybody, who found this?
>
> "Mr. Kistler: We will get to that and put it in evidence, but I thought it should be in for identification purposes.
>
> "The Court: Well, until you show some evidence of the defendants having it, it is a little bit premature to offer it.

> "Mr. Kistler: It was identified by Mr. Doveton as one in his store and not sold of course.
>
> "The Court: Well, you have not any witness on the stand yet that found it in that automobile, have you?
>
> "Mr. Kistler: No, sir.
>
> "The Court: All right."

Appellant argues that the trial court thus made a statement of fact that the alleged stolen sewing machine was found in the automobile, but in view of the fact that it was admitted by everybody that the machine was found in the automobile this contention is utterly without merit.

[3] The next comment of the trial court cited by appellant as prejudicial occurred when appellant's counsel was cross-examining a witness. The record shows the following:

> "Q. [Mr. Galvin]: Now that is Flores. Now I mean Argandar, the other one. A. He stated nothing very directly, nothing more than that he was with—
>
> "Q. That he had been in there?
>
> "Mr. Kistler: Now your Honor, he should let the witness answer the question.
>
> "The Court: Go ahead, Chief, you are doing all right.
>
> "Mr. Galvin: Go ahead."

Appellant argues that the court's statement, "Go ahead, Chief, you are doing all right," was putting the court's stamp of approval on the testimony of the witness, but it is to be noted that appellant's counsel followed up the remark of the court with the statement, "Go ahead." While the comment "you are doing all right" might well have been omitted, we are satisfied that no prejudice resulted to appellant.

[4] The next complaint of the appellant relates to the statement made by the trial court in sustaining an objection of defense counsel to questioning by the deputy district attorney of the defendant Argandar as to what he was going to do with the sewing machine after he decided to take it. The statement of the court was as follows:

> "The Court: The only question is whether or not he did take it, and what he was going to do with it or why he took it, we are not concerned with. We are only concerned with the one question. Did he take it?
>
> "Mr. Kistler: And did he have the intention of taking it when he went in the store, your Honor?
>
> "The Court: Well, that is answered by the fact that he took it. That is for the Jury to decide also."

Appellant argues: "Bearing in mind that this jury was to decide the fact as to whether each of the defendants charged with Burglary entered the Singer Sewing Machine Store with intent to commit theft therein, the Court's observation in open court that that was answered by the fact that he took it was an invasion of the problems of the jury and an expression from the Court to the jury that the fact of intent to steal was evidenced by the mere fact that the defendant Argandar did take the machine. His subsequent words, 'That is for the jury to decide also' could not possibly have cured, or in any way offset, the terrible damage committed to the defendant by the Judge's very improper and illegal remarks." While the portion of the court's remarks, "that is answered by the fact that he took it," taken out of context, may not be a correct statement of law as to the intent with which defendant Argandar (not the appellant) had entered the store, the court immediately followed the statement with the remark, "That is for the jury to decide also," which shows clearly that the trial court intended to and did indicate to the jury that it was for them to decide with what intent defendant Argandar entered the store. And in view of the fact that the jury was fully instructed as to the elements necessary to justify a conviction of the offenses charged, no possible prejudice could have resulted to appellant from the said comment of the court.

Other remarks of the court asserted by appellant to have been prejudicially erroneous are set forth by appellant, but they are even less lacking in merit than the ones hereinbefore mentioned, and we shall not unduly prolong this opinion by discussing them.

Appellant next contends that prejudicial error was committed by the court in questioning some of the officers who testified and in permitting certain questions to be answered. However, the record again shows that no objection to any of said questions was made at the trial, and appellant is not entitled to make the point for the first time on appeal. Nevertheless, we are satisfied from an examination of the record that the evidence was admissible.

[5] Appellant next contends that the court erred in admitting into evidence a movie camera and some statuette horses which were found in the automobile at the same time the sewing machine was found. The court in admitting the evidence stated that they were received to show what was in the automobile, and there was no error in receiving them for that purpose.

[6] Officer Demes, a detective in the narcotics division of the Fresno County District Attorney's office was permitted to testify that he had followed appellant for three months after the date of the alleged crime, and that both appellant and Argandar were unemployed. Appellant urges this as objectionable because irrelevant to the offense for which appellant was tried, and highly prejudicial because it tended to characterize appellant as a character type who *might* commit burglary.

Respondent counters with the assertion that the evidence was properly admissible to refute defendants' contention that they were virtual strangers and that therefore there could be no collusion in the offense charged, because it showed that they were in fact well acquainted, and supported the inference that their acts were in concert.

The record shows that no objection was made to this testimony and further that appellant's counsel brought out from the witness on cross-examination additional facts not testified to on direct examination, so even if the evidence were inadmissible, appellant is hardly in a position to raise it for the first time on appeal.

[7–9] Appellant's final contention is that the following portion of the cross-examination of co-defendant Argandar shows prejudicial misconduct on the part of the Deputy District Attorney:

> "Mr. Kistler: As a matter of fact, Louie, this is rather a common procedure of shoplifters, isn't it?
>
> "Mr. Galvin: Now just a moment, if your Honor please, that is certainly incompetent.
>
> "Mr. Kistler: I think I can—
>
> "The Court: That is sustained. We are not concerned about anybody's practice. Only this man here. The objection is sustained.
>
> "Mr. Kistler: Have you ever shoplifted anything else in this manner, Louie? A. No."

Appellant argues that this is prejudicial misconduct, because, even though appellant Flores was not on the stand, he was a co-defendant, being tried by the same jury, which could not strike from their minds the unfavorable effect that such a line of cross-examination would have on them, thus denying appellant a fair and impartial trial. In reply respondent argues, correctly, that since an objection was sustained to the first question of the prosecutor, it is to be assumed that the jury in following their instructions disregarded testimony to which objection was sustained. As to the second question, no objection was raised thereby by defense counsel, and objection may not be made for the first time on appeal. Further, since Argandar had already admitted the theft by means of the procedure known as "shoplifting," the question was proper to ascertain if this was part of the plan of operation.

[10] The record in the instant case points so conclusively to appellant's guilt that, even if appellant were correct in some of his contentions of error, we could not hold, in view of the provisions of Section 4½ of Article VI of our State Constitution, that the errors complained of have resulted in a miscarriage of justice.

In view of the foregoing the judgment is affirmed.

VAN DYKE and PEEK, JJ., concur.

113 Cal.App.2d 861

PEOPLE v. COLLIER.

Cr. 774.

District Court of Appeal, Fourth District, California.

Oct. 28, 1952.

Hearing Denied Nov. 25, 1952.

Defendant was convicted in the Superior Court of San Diego County, L. N. Turrentine, J., of rape and assault with intent to commit rape, and new trial was denied, and he appealed. The District Court of Appeal, Barnard, P. J., held that testimony of defendant's victims, with respect to the defendant's identification, was not so improbable and incredible as to be insufficient to support verdict.

Judgment and order affirmed.

1. Rape ⚷51(7)

In prosecution for rape and assault with intent to commit rape, wherein three of the four women involved had positively identified defendant as the attacker, and it appeared that attacks had occurred approximately two hours after sunset in area in which there were street lights and lights from businesses and houses, evidence with respect to identification was not so improbable and incredible as to be insufficient to support verdict.

2. Rape ⚷51(1)

Evidence that woman was struck severely and knocked down by defendant, but was not asked for money, when taken with surrounding circumstances, was sufficient to show intent by defendant to commit rape.

3. Constitutional Law ⚷268

Where offenses of rape, assault with intent to commit rape and assault by means of force likely to produce great bodily injury, involving four different women, had all occurred in same general area about same time of day, and in each instance by physical force and use of weapon, trial of defendant on five counts of such offenses at one time was not a denial of due process, and especially when no objection to consolidation of counts, or motion for separate trial, appeared in record.

4. Criminal Law ⚷810, 1172(4)

In prosecution for rape, assault with intent to commit rape, and assault by means of force likely to produce great bodily injury, wherein the last two of five counts involved charge of assault with intent and assault by means of force as to certain woman, and District Attorney suggested in closing argument that there be verdict of guilty on fourth count and one of not guilty on fifth count, statement of judge that he would prefer that jury consider both these counts in arriving at verdict on one or the other, and that they leave the other blank, was not a suggestion that defendant be found guilty on any count or an inconsistent statement with reference to counts which could amount to reversible error.

5. Criminal Law ⚷1173(2)

Where defendant charged with rape and with assault with intent to rape, was previously unknown to the four victims of such offenses, and the only difficulty of proof related to the matter of identification of defendant, although cautionary instruction requested should have been given, failure to give same did not constitute reversible error.

6. Rape ⚷59(1)

In prosecution for rape and assault with intent to rape, instruction that jury must consider case without regard to sympathy, prejudice or passion for or against either party was not improper on ground that complaining witnesses were not parties to the action, but such objection was more technical than substantial.

7. Criminal Law ⚷825(1)

Where jury in rape prosecution was instructed that a witness false in one part of his testimony is to be distrusted in others, failure of court to explain that any such falsity must be as to a material fact and willful was not error when no other instruction containing such explanation was requested.

8. Criminal Law ⚷776(2)

In prosecution for rape and assault with intent to rape, instruction that evidence of character is admissible because the law recognizes that a person of good character would probably not commit such a crime, and that such evidence should be considered with other evidence in determining whether the evidence shows guilt beyond a reasonable doubt was sufficient, notwithstanding objection that court did not tell jury that good character may create a reasonable doubt.

9. Assault and Battery ⚷96(1)

In prosecution for rape and assault with intent to rape, and with assault by means of force, evidence did not warrant giving of instruction with respect to simple assault.

10. Criminal Law ⚷388

In prosecution for rape, and assault with intent to commit rape, wherein it appeared that four women were involved and essential question was identification of defendant as attacker, and evidence of experiments was offered to determine possibility of physical identification, question of similarity of conditions under which experiments were to be made rested in discretion of trial court, and court did not err in excluding such evidence in view of differences in conditions of time, persons, and other factors.

11. Criminal Law ⚷470

In prosecution for rape and assault with intent to commit rape, wherein main issue was that of identification of the defendant as the attacker, exclusion of expert testimony on the subject of the relationship between emotional tendencies and ability to identify, and of relative reliability of observation of a victim under circumstances described, was proper in that evidence offered went to matter within province of jury.

12. Constitutional Law ⚷257

In prosecution for rape, and assault with intent to rape, wherein it was contended that the police procedure in connection with identification of defendant constituted a denial of due process, and it appeared that matters of identification had been gone into thoroughly and presented to the jury, record disclosed no denial of due process.

13. Criminal Law ⚷938(3), 940

Where newly discovered evidence relied upon in motion for new trial was either available to defendant at first trial, or was hearsay from an unidentified source, denial of new trial was not improper.

14. Rape ⚷51(1), 53(2)

Evidence sustained conviction on four counts of assault with intent to commit rape and of rape.

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Richard L. Rykoff, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in Count I with the crime of rape; in Count II with assault with intent to commit rape; in Count III with rape; in Count IV with assault with intent to commit rape; and in Count V with assault by means of force likely to produce great bodily injury. The charges involve four different women, the fourth and fifth counts being different charges in connection with the same incident. The jury found him guilty on the first four counts and made no finding on the fifth count, which was then dismissed. This appeal is from the judgment and from an order denying a new trial.

These four incidents all occurred within a few blocks of each other in the Frontier Housing Project in San Diego, in which project the appellant had lived for several years. No attempt was or is made to challenge the testimony of the victims, except as to their identification of the appellant. At the trial each of the women positively identified the appellant as her assailant, giving good reasons therefor, and in each instance her testimony was not shaken by an extensive and able cross-examination. Each of them had previously picked out the appellant's picture from seven different photographs shown them by an officer, and had later picked him from a police line-up of four men. Each recognized his voice, in addition to other means of identification. None of them had previously known any of the others, and each made the previous identifications independently and without suggestion.

The woman involved in the first count was married and the mother of two children. On her way home on October 23, 1951, between 6:00 and 6:30 p. m. she was walking uphill on Leland Street, which at one point passes along the edge of a canyon. Halfway up the hill she met a man who grabbed her and threatened to cut off her head if she hollered. He had a knife in his hand and dragged her down into the canyon, where he raped her.

The appellant testified that he particularly recalled that on October 23, he took a Mrs. Fowler to choir practice at her church, in accordance with his usual custom; that he left home about 6:45 or 6:50 p. m., and picked up Mrs. Fowler where she worked at about 7:15; that he left her at about 7:45 and returned to his home; arriving there at 8:30; and that he did not leave the house after that. He was confronted with a police record showing that on October 23 he arrived at the police station at 7:50 p. m., where he paid a fine for a traffic violation. After being shown this record he said that when he got home he was told that an officer had left word for him to come to the police station, which he did. He then admitted that if he had taken Mrs. Fowler as he said, and then gone to his home, he could not have arrived at the police station before 9:00 p. m. He then admitted that he did not remember anything that happened on October 23, saying that all he had meant to say was that if it was a Tuesday or Wednesday it was one of those days on which he took Mrs. Fowler to church. Mrs. Fowler's testimony in this connection threw further doubt upon appellant's alibi. There was also evidence that one could drive from near where this attack occurred to the place where Mrs. Fowler was employed in 12 minutes.

The woman involved in the second count was married and the mother of two children. On November 21, 1951, about 7:00 p. m., she was standing in front of a school waiting for a Cub Master to take her to a Cub Scout meeting. There were street lights some half block away in either direction. She saw a man coming under one of the street lights. When he approached he threatened her with a pistol, and told her if she screamed he would kill her. He pulled her into the school yard, threw her on the ground, and attempted to rape her. When she managed to scream, he ran through the school yard to another street. Two boys came to her assistance and saw the man running away.

The appellant testified that he did not recall the date of November 21, but said that if it was a Wednesday he took Mrs Fowler to prayer meeting; that he customarily took her to prayer meetings on Wednesdays, following the same schedule as on Tuesdays. Mrs. Fowler testified that she had an understanding with the appellant for him to pick her up on Tuesdays and Wednesdays; that she worked until 7:30, but usually got away about 7:15 on those days; that she remembered riding with the appellant on the night of November 21; and that she went to prayer meeting. Later, she testified that all she remembered about November 21 was that the appellant took her to prayer meeting on Tuesday and Wednesday nights, and that she did not have any idea what night of the week November 21 was.

The woman involved in the third count lived with her father and mother, and had never been married. She was walking up the Leland Street hill on her way home from work about 6:30 p. m. on December 15, 1951. About the same spot involved in Count I she was accosted by a man who grabbed her by both arms, face to face. He pushed her over the bank and into the canyon. He had a knife in his hand and threatened to cut her throat if she did not keep quiet. He threw her to the ground and raped her. She ran up the hill where she met an officer in a prowl car at 6:45 p. m. After a 10-minute search for the man, they returned to the canyon where the officer found her panties. In addition to the picture and the line-up, this woman was taken to the appellant's home on December 29, and identified him as her attacker.

The appellant testified that on December 15, he was at a friend's house from 5:00

p. m. to 2:00 a. m., playing poker with four men. He could not remember what he had done that day, where he came from when he went there, whether he went home for dinner, or whether he ate dinner at all. He said the same four had played poker on December 8, but he could not remember where they played or when they started. The testimony of the other card players revealed several uncertainties and variations as to times and dates. One man was sure of the date since he had broken his arm in November and "because most I go to the doctor every Monday morning." He could not identify any other Saturdays in connection with any other Monday visits to the doctor.

The woman involved in the fourth count was married and had children. About 6:15 p. m. on December 24, 1951, she walked up a little hill near Leland Street to look at the view. A man approached, grabbed her and threatened to cut her throat if she screamed. She screamed, and the man struck her several severe blows across the face and head. As she fell to the ground she saw him running away. She did not have a purse and the man did not ask for money. As she ran for home a neighbor came to her assistance. She was admitted to the hospital at 6:42 p. m. Her dress was badly torn and there were cuts on her ear, cheek and chin. Before she was given medical attention and her wounds stitched, the appellant was brought to the hospital, arriving at 7:08 p. m. When told that the officers wanted to bring a man in the woman objected violently. She was hysterical and very frightened, and screamed that she did not want to see anyone. The nurse covered her face except for one eye and the appellant was brought in. When asked if this was the man who attacked her she shook her head and said "No". At the trial she testified that at that time she did not recognize him and to her he was just a man.

The appellant testified that on December 24, he left downtown San Diego shortly after 6:00 p. m., having picked up two sailors; that he drove out Pacific Highway and Midway on his way home; that when he turned off Midway at Fordham he stopped to let them out; that they then said they would ride over to Frontier Street; that after going two blocks they stopped him and held him up; that this was between 6:30 and 7:00 p. m.; that one of the sailors held a knife on him while the other took $29 from his pocket; that when he tried to hit one of them the other struck him with the knife, cutting his thumb; that his thumb bled on the pavement and the sailors ran off; that he drove home with his left hand, holding his right hand up; that on the way he met Paul Dunn who followed him home; that he got home about 6:45 p. m. and told his wife to call the police; and that the police arrived shortly thereafter and took him to the hospital.

The appellant made several conflicting statements about this robbery. Among other things, he first said the sailors had taken $9, later changed this to $29, and $12 was found on him when he was taken in. The next morning he and an officer visited the scene of the alleged attack. When no sign of blood was found, he claimed it had rained that night. Later that day the officer found many blood marks near where the woman had been attacked the night before. There was a deep cut crossways on the appellant's thumb, which did not jibe with his story of how the sailor had cut him. The scene of the claimed robbery was a heavily traveled street a short distance from Midway, a main highway. Paul Dunn and another friend of the appellant contradicted him in several respects. From the entire evidence in this connection, an inference may fairly be drawn that the robbery story was invented for the purpose of explaining the cut received in a struggle with this woman.

[1] The appellant first contends that the evidence, with respect to his identification, is so improbable and incredible that it must be held insufficient to support the verdict. It is argued that none of the victims could have seen her assailant well enough to identify him; that each attack occurred some two hours after sunset; that the observation of each victim would be affected by her nerve-racking experience; that the identifications were prepared for

by showing the victims photographs prior to a police line-up; that in two cases considerable time had elapsed; and that one of the women did not recognize him at the hospital shortly after the incident occurred.

Ample reason for the latter fact appears, and the matter was thoroughly covered in the evidence. The argument that practically nothing could be seen by the victims is contrary to common knowledge and experience. Naturally, these events did not take place immediately under street lights, but there were many street lights and lighted houses throughout that area, and many business places with strong illumination not far away. The officer who checked the scene, about ten minutes after one of the crimes occurred, testified that while there he did not have to use a flashlight in order to recognize another person, and that "There is quite a bit of sign glow there from the numerous establishments on Midway Drive." Each of the victims testified that she could see her attacker and each was positive in her identification. The question was entirely one of fact and in each instance the evidence is amply sufficient to support the testimony here questioned. Any claimed inconsistencies and contradictions were called to the attention of the jury and may not be here accepted as controlling. People v. Thomas, 103 Cal.App.2d 669, 229 P.2d 836; People v. Alexander, 92 Cal.App.2d 230, 206 P.2d 657; People v. Kittrelle, 102 Cal.App.2d 149, 227 P.2d 38; People v. Deal, 42 Cal.App.2d 33, 108 P.2d 103. It may be also observed that the matter of identification was strengthened by the nature of the alibi evidence.

[2] It is next contended that the evidence is insufficient to sustain the verdict of guilty on Count IV. It is argued that while it shows violence it is insufficient to show an intent to commit rape. The victim who was struck severely and knocked down was not asked for money. The circumstances were such as to justify an inference that an act of rape was intended, and that her assailant desisted when in the struggle he cut his own thumb. While the evidence is somewhat meager, we think it is sufficient. People v. Nye, 38 Cal.2d 34, 237 P.2d 1.

[3] It is next contended that the appellant was deprived of due process of law by being tried on all five counts at one time. It is argued that the evidence as to identification was so slight that none of the charges would have stood up had it been tried alone, and that this is indicated by the fact that the jury convicted him under Count IV instead of Count V. This fact does not so indicate, and the identification evidence was far from slight. The offenses were of the same nature, they occurred in the same general area about the same time of day, and in each instance physical force and a weapon were used. In one case this appears inferentially, from the cuts received. These counts were properly joined. People v. Kramer, 103 Cal.App.2d 35, 229 P.2d 53; People v. Walker, 112 Cal.App.2d 462, 246 P.2d 1009. Moreover, no objection to consolidation of the counts, or motion for a separate trial, appears in the record. People v. Van De Wouwer, 91 Cal.App.2d 633, 205 P.2d 693.

[4] It is next contended that the court made inconsistent statements with respect to the fourth and fifth counts, and in effect told the jury it must find the appellant guilty on Count IV. In his closing argument the district attorney had suggested a verdict of guilty on the fourth count and one of not guilty on the fifth count, since they both arose out of the same incident. In explaining the different forms of verdict submitted, the judge stated that while he was in accord with the statement of the law as to this matter, he would prefer that the jury follow a different procedure than that indicated by the district attorney. He then suggested that when the jury came to those counts it consider them and arrive at a verdict on one or the other, and leave the other blank. No suggestion was made that the appellant be found guilty on any count, and no inconsistency or reversible error appears.

[5] The appellant claims prejudice in the failure of the court to give a cautionary instruction, although one was proposed by

each side, and cites People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485 and People v. Putnam, 20 Cal.2d 885, 129 P.2d 367. These cases, and many others, hold that such an instruction should be given in such cases, but that the question of whether or not a failure to do so is prejudicial must depend on the circumstances of each case. In the Lucas case the judgment was affirmed, it being held that the circumstances were not such as to require a reversal. The Putnam case was reversed because, in view of the nature of the evidence, it was doubtful whether the same verdict would have been reached if the instruction had been given.

While we think this instruction should have been given, the failure to do so cannot be held to be reversible error in view of the evidence and the other instructions which here appear. The principles applied in the Lucas case are controlling here. Moreover, the main reasons for the rule relied on are less persuasive here. The factual background was conceded; the parties had not known each other, and there was not the usual "opportunity for the free play of malice and private vengeance"; and any difficulty of proof related solely to the matter of identification, being no greater than that involved in cases of other types.

[6-8] The appellant complains of several instructions, which require no extended consideration. The jury was told that it must consider this case "without regard to sympathy, prejudice or passion for or against either party." The objection, that the complaining witnesses were not parties to the action, is more technical than substantial. The jury was told that evidence of oral admissions of a party should be viewed with caution. The objection is that none were made. There was one statement which might have been so considered, and no prejudice appears. The jury was told that a witness false in one part of his testimony is to be distrusted in others. The objection is that the court failed to explain that any such falsity must be as to a material fact and willful. No other instruction was asked for. Complaint is made that an instruction as to the degree of proof necessary to convict was too long, complicated and confusing. The objection is without merit. Complaint is made of an instruction telling the jury that evidence of character is admissible because the law recognizes that a person of good character would probably not commit such a crime, and that such evidence should be considered with the other evidence in determining whether the evidence shows guilt beyond a reasonable doubt. The objection is that the court did not tell the jury that good character may *create* a reasonable doubt. The instruction was sufficient. People v. Navarette, 21 Cal.App.2d 598, 69 P.2d 449. The jury was told that it was not bound to decide the case because of a greater number of witnesses, which did not convince them, as against a lesser number. The objection seems to be that the appellant produced more witnesses, and is without merit.

[9] It is further contended that the court erred in failing to instruct the jury with respect to "the evidence necessary for conviction under the separate counts"; in failing to instruct that a juror should not vote guilty merely because the majority so voted; and in failing to instruct with respect to a lesser offense, simple assault, in connection with Counts IV and V. The first two of these matters were adequately covered by other instructions. The last one was not required by the evidence, and no such instruction was asked for. We find nothing in the instructions given or refused which deprived the appellant of any substantial right.

[10] It is next contended that the court erred in excluding evidence of "experiments to determine possibility of physical identification." An offer of proof was made as to what an investigator was able to see on the afternoon of a clear day with the sun shining, while standing where the woman involved in the second count stood, and looking toward the street light where she first saw the man approaching. Evidence was offered as to the same experiment conducted at 8:00 p. m. on March 24, 1952. The conditions of time, persons

and many other factors were entirely different. The essential question of similarity rested in the discretion of the trial court. McGough v. Hendrickson, 58 Cal.App.2d 60, 136 P.2d 110. This whole matter was largely immaterial, since the real question involved was what this woman was able to see after the man came face to face with her, and while she was struggling with him. No reversible error appears in this connection.

[11] It is next contended that the court erred in refusing to admit expert testimony "on the subject of the relationship between emotional tendencies and ability to identify." Complaint is made of the refusal to permit a professor of psychology to testify as to the reliability of the observation made by the victims under the circumstances shown by the evidence here. In a hypothetical question the professor was asked to give his views "relative to the reliability of the observation of this young lady under the circumstances as described." Counsel stated that this was offered for the purpose of showing the jury "the high possibility of error in eye identification." An offer of proof was made on the ground that "an individual under emotional stress would be less likely than at other times to make correct observations." The evidence was rejected on the grounds that this was a matter within the province of the jury, and that the proffered evidence was not within a proper field for expert testimony. We think this ruling was correct. The matter was one within the field of common knowledge and experience, and the effect of such emotional strain was one of the things which should be, and was, argued to the jury. No substantial right of the appellant was prejudiced by the exclusion of this evidence.

[12] It is next contended that the police procedure, in connection with the identification of the appellant, constituted a denial of due process of law. It is admitted that no one act invaded his rights, but it is argued that the entire procedure had that effect. The objection is that the seven photographs shown to the victims had identifying numbers indicating that these individuals had previously run afoul of the law; that one of the victims was taken to view the appellant prior to the police line-up; that there was too much dissimilarity physically between the appellant and the other three men in the line-up; and that one of the officers had a preconceived idea that the appellant was guilty, as shown by his investigation of the case and his testimony at the trial. Several statements made in this regard are contrary to the facts shown by the record. The photographs and pictures of the four different line-ups are in evidence and they furnish the best answer to most of these contentions. All of these matters were thoroughly gone into and presented to the jury, and no denial of due process appears.

[13] The next contention is that the court erred in denying a motion for a new trial, based on three grounds. The first two, claiming error in rejecting the evidence of the psychology professor, and in rejecting the evidence as to "visual" experiments, have already been considered. The third ground was that of newly discovered evidence. This involved two alleged facts. One of them, if true, was known by the appellant prior to the trial. The other, relating to the victim in the third count, was not only hearsay but was stated to have been given to counsel over the telephone from an unidentified source. No attempt was made to show that any definite evidence was available. The showing was insufficient, People v. English, 68 Cal.App.2d 670, 157 P.2d 429; People v. Merrill, 104 Cal.App.2d 257, 231 P.2d 573, and no prejudicial error appears.

[14] The final contention is that a review of the evidence, with the cumulative effect of the errors claimed, must lead to the conclusion that there was a miscarriage of justice. We have read the entire record and find nothing which justifies the conclusion that a miscarriage of justice has occurred.

The judgment and order are affirmed.

GRIFFIN, J., concurs.

STAFFORD v. REALTY BOND SERVICE CORP.

REALTY BOND SERVICE CORP. v. STAFFORD.

L. A. 21835, 21836.

Supreme Court of California, in Bank.

Oct. 28, 1952.

Rehearing Denied Nov. 25, 1952.

Quiet title action and separate suit for partition. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment and an appeal was taken by the plaintiff in the quiet title action and by the defendant in the partition suit. The Supreme Court, Spence, J., held that where sale of property for delinquent street assessment was held in 1930, which was well within the time contemplated by law, and the statute then provided unlimited time for issuance of deed after lapse of 12 months from date of sale, the holder of certificate issued on such sale was entitled to have deed issued thereon after January 1, 1947, which was the termination date fixed by 1945 statute for presumed extinguishment of liens.

Judgments affirmed.

Prior opinion, 242 P.2d 936.

1. Municipal Corporations 🔑519(5)

The purpose of 1945 revision of the laws relating to the duration and extinguishment of assessment liens was to restore the delinquent properties to the tax rolls. Civ.Code, § 2911; Code Civ.Proc. § 330.

2. Municipal Corporations 🔑519(5)

Where sale of property for delinquent street assessment was held in 1930, which was well within the time contemplated by law, and the statute then provided unlimited time for issuance of deed after lapse of 12 months from date of sale, the holder of certificate issued on such sale was entitled to have deed issued thereon after January 1, 1947, which was the termination date fixed by 1945 statute for presumed extinguishment of liens. Civ.Code, § 2911; Code Civ.Proc. §§ 330, 801.1–801.15, 801.11; Streets and Highways Code, §§ 4000 et seq., 4343, 4344, 4346, 4350.

3. Municipal Corporations 🔑581

The term "redemption" in statute providing that upon filing of certificate of sale issued upon a delinquent street assessment, the lien of street assessment vests in purchaser and is only divested by a "redemption", means in a literal sense the act of buying back or repurchasing, and it connotes a change of interest in the thing to be redeemed and implies that there is something to be redeemed, and that something lost is to be gotten back. Streets and Highways Code, § 4343.

See publication Words and Phrases, for other judicial constructions and definitions of "Redemption".

4. Municipal Corporations 🔑577, 581

The "certificate of sale" issued upon a delinquent street assessment is a memorial signed by a public official authorized by law to sell the property, and it sets forth what has taken place at the sale and evidences the conduct of proceedings whereby equitable title to the property is conditionally vested in the purchaser, subject to be defeated by a redemption, but if not so redeemed as provided by law, it entitles the holder to a deed vesting in him legal title to the property. Streets and Highways Code, §§ 4000 et seq., 4343, 4346.

See publication Words and Phrases, for other judicial constructions and definitions of "Certificate of Sale".

5. Municipal Corporations 🔑577

Where a certificate of sale has been issued on a delinquent street assessment, the former owner, by redemption, buys back the property, whereas by the payment of such delinquency prior to sale, the former owner merely pays a debt against his own property, and hence the certificate of sale is intended to convey to the purchaser more than a mere "lien" within the common understanding of that term as signifying only a claim of indebtedness against the property. Streets and Highways Code, § 4343.

See publication Words and Phrases, for other judicial constructions and definitions of "Lien".

6. Municipal Corporations 🔑519(5)

A certificate of sale issued on a delinquent street assessment is not such a "lien" as is contemplated by the presumption of extinguishment provided by 1945 amendment to statute relating to duration of assessment liens. Civ.Code, § 2911.

7. Statutes ⚿212.4

The Legislature would not be assumed to have indulged in the idle act of enacting a superfluous enactment.

8. Statutes ⚿223.1

Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.

9. Statutes ⚿184, 217.1, 223.1, 223.2(21)

In construing the remedial statutes relating to duration and extinguishment of assessment liens, all of which affect the finality and security of land titles, it is proper to consider the history and purpose of the enactments, the previous state of the legislation on the subject, other statutes in pari materia and the benefits sought to be provided. Civ.Code, § 2911; Code Civ. Proc. §§ 330, 801.1–801.15.

10. Statutes ⚿212.1

In enacting 1949 legislation relating to determination of alleged property interests arising by reason of certificate of sale issued on delinquent street assessment and prescribing a time limitation for procurement of deed thereon, the legislature would be presumed to have had knowledge of judicial decision holding the extinguishment of lien provision under 1945 statute inapplicable where sale proceedings had been instituted within the prescribed time, and to have enacted the 1949 legislation in the light of such decision. Civ.Code, § 2911; Code Civ.Proc. §§ 801.1–801.15.

11. Tenancy in Common ⚿3, 18

The holder of tax deed and the holder of validly issued deed to holder of certificate of sale issued on delinquent street assessment were tenants in common with right to enforce their respective equitable liens against the property. Civ.Code, § 2911; Code Civ.Proc. §§ 330, 801.1–801.15, 801.11; Streets and Highways Code, §§ 4000 et seq., 4343, 4344, 4346, 4350.

◆

Guy N. Stafford, in pro. per.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for respondent.

Ray L. Chesebro, City Atty., Los Angeles, Louis A. Babior and Spencer L. Halverson, Deputy City Attys., Los Angeles, amici curiae on behalf of respondent.

SPENCE, Justice.

The primary question to be determined is the right of a holder of a certificate of sale, made in satisfaction of a delinquent street assessment, to have a deed issued thereon after January 1, 1947, the terminative date fixed by section 2911 of the Civil Code, as amended in 1945, for the presumed extinguishment of liens.

In 1933 the lot in question was sold to the state because of a failure to pay 1927 property taxes. By deed in 1944 the state conveyed its tax title to one Lorna Stafford, who in 1946 conveyed the property to appellant Stafford. Meanwhile in 1930 the city, proceeding under the Street Opening Act of 1903, now codified as Sts. & Hy. Code, Div. 6, Pt. 1, sec. 4000 et seq., levied an assessment against the property. The assessment not being paid, the property was sold on December 15, 1930, and a certificate of sale was issued therefor.

On April 20, 1949, appellant Stafford brought an action to quiet title against respondent Realty Bond, holder of the certificate of sale. On June 20, 1949, respondent, in pursuance of its certificate, procured a deed from the Board of Public Works. Sts. & Hy.Code, sec. 4346. Then on June 30, 1949, respondent brought a separate suit for partition against appellant, alleging that the parties were cotenants of the property. The court made findings in both cases in favor of respondent, disposing of the opposing tax and street assessment liens in accord with the parity principle. It expressly decreed that the parties were the owners of the property "as tenants in common, each owning an undivided one-half interest" therein; that appellant was the holder of an equitable lien upon the property in the sum of $200 (the amount shown to have been paid for the tax deed by appellant's predecessor in interest); that respondent was the holder of an equitable lien upon the same property in the sum of $1,332.65 (the principal amount of the assessment plus interest and penalties computed to be due on the certificate of sale at the time the deed was issued thereon); that the property should be sold by a referee and the proceeds apportioned in accordance with the terms of decree. Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995; Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537. From such judgments appellant appeals.

Appellant contends that respondent's certificate of sale constituted no more than a lien which was extinguished on January 1, 1947, under Civil Code section 2911, as amended in 1945, and that consequently respondent's deed, issued in reliance on such certificate after the terminative date, is without valid basis. Accordingly, appellant maintains that the court improperly applied the parity principle. But an analysis of the statutory law and the legal principles applicable to the disposition of the parties' opposing claims will demonstrate the impropriety of appellant's position.

[1] In 1945 considerable property in the state was burdened with unpaid overlapping assessment and tax liens, delinquencies which in many cases exceeded the value of the property and constituted perpetual clouds against land titles. To relieve such chaotic economic condition, the legislature in 1945 undertook a complete revision of the subject, with the purpose of restoring the delinquent properties to the tax rolls and providing, without impairment of rights, a definite period of time for the duration and enforcement of delinquent property liens. Rombotis v. Fink, 89 Cal.App.2d 378, 390, 201 P.2d 588; also Scheas v. Robertson, 38 Cal.2d 119, 125, 238 P.2d 982. Accordingly, as here pertinent, section 2911 of the Civil Code was amended that year to read as follows: "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure * * * 2. A treasurer, street superintendent or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent such assessment and which assessment is secured by a lien upon said real property; whichever is later." At the same time section 330 of the Code of Civil Procedure was enacted to provide that when the official has the authority to sell the property, he "may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to January 1, 1947, whichever is later, but not thereafter."

Here the sale of the property for the delinquent street assessment was held in 1930, which was well within the time contemplated by law. Under section 4343 of the Streets and Highways Code, upon issuance of the certificate of sale, "the lien of the assessment shall vest in the purchaser, and is only divested by a redemption of the property * * *." Section 4346 of said code then provided that "at any time after the expiration of 12 months from the date of sale," the street superintendent might "execute to the purchaser, or his assignee * * * a deed of the property sold, which shall recite substantially the matters contained in the certificate, also any assignment thereof and the fact that no person has redeemed the property." Despite this unlimited time for issuance of the deed after the lapse of twelve months from the date of sale, appellant argues that respondent was required to procure a deed before January 1, 1947, in order to preclude the extinguishment of the "lien of the assessment". In this contention appellant relies on that language of section 2911 of the Civil Code, as amended in 1945, providing that "any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished * * * on January 1, 1947".

[2] But the determinative consideration here is the fact of sale of the property in 1930 in satisfaction of the delinquent street assessment. Thereby the initial steps in preservation of the lien were taken and the amount of the assessment claim against the property was made a matter of record. Cf. Sipe v. Correa, 38 Cal.2d 131, 134–135, 238 P.2d 989. A similar problem was presented in Missler v. Sommer, 92 Cal.App.2d 417, 206 P.2d 1116, where the sale on the delinquent improvement bond was not consummated until after January 1, 1947, although foreclosure proceedings had been instituted with the proper public official a few months before that date. It was argued

that the sale was not caused to be timely made, that the lien of the bond was therefore extinguished under the 1945 amendment to section 2911 of the Civil Code, and that the sale as actually concluded was void as without legal basis. The court rejected this theory of extinguishment of the bond lien where demand was made to the authorized official for the sale prior to the time limit specified therefor by section 330 of the Code of Civil Procedure. Such case was distinguished from the situation existing in Rombotis v. Fink, supra, 89 Cal.App. 2d 378, 201 P.2d 588, where no foreclosure proceedings at all were commenced prior to January 1, 1947. Such inaction on the part of the bondholder brought into play the provision for extinguishment of the assessment lien as provided by the 1945 amendment to said section 2911 of the Civil Code, construed as a valid statute of limitations affecting the duration and enforcement of preexisting bond liens.

In the Missler case at page 419 of 92 Cal. App.2d, at page 1117 of 206 P.2d the court said: "It is appellant's contention in substance that the word *sell* in section 330 (Code Civ.Proc.) is all-inclusive and contemplates each, all and every act required to be performed in the process. And that unless the last act is performed within the four years or before January 1, 1947, the sale is void. The Fink case does not support such a construction. Indeed such a strict and limited interpretation of section 330 would not only defeat the purpose of that section, but by analogy would complicate other provisions of Chapter II and Title II of the Code of Civil Procedure (Time for Commencement of Civil Actions). The sale of the property in the within action in the circumstances was according to law as contemplated by the above provisions." Here not only the demand but the actual sale was completed more than sixteen years before January 1, 1947, so as to bring this case even more effectively without the time limitation of the 1945 legislation for the taking of action in the enforcement of delinquent assessment liens so as to avoid their extinguishment under statutory law.

[3-5] Moreover, regard must be had for the position of the holder of a certificate of sale under the law. Upon the filing of the certificate, the lien of the assessment vests in the purchaser and is only divested by a "redemption." Sts. & Hy.Code, sec. 4343. The term "redemption," in a literal sense, means the act of buying back or repurchasing. Webster's New International Dictionary, 2d Ed. It connotes a change of interest in the thing to be redeemed, and implies that there is something to be redeemed, "something lost to be gotten back". Seward v. Dogan, 198 Miss. 419, 21 So.2d 292, 295; cf. Marker v. Scotts Bluff County, 137 Neb. 360, 289 N.W. 534, 537; Lincoln County v. Shuman, 138 Neb. 84, 292 N.W. 30, 33; Vol. 36, Words and Phrases, page 592. By analogy, the certificate of sale issued upon a delinquent street assessment may be construed to have many of the attributes of a like certificate acquired upon an execution sale. In each instance the certificate is a memorial signed by a public official authorized by law to *sell* the property. It sets forth what has taken place at the sale and evidences the conduct of proceedings whereby equitable title to the property is conditionally vested in the purchaser, subject to be defeated by a redemption, but if not so redeemed as provided by law, it entitles the holder to a deed vesting in him legal title to the property. Cf. Foorman v. Wallace, 75 Cal. 552, 556, 17 P. 680. There thus appears this significant distinction: Where a certificate of sale has been issued on a delinquent street assessment, the former owner, by redemption, buys back the property, whereas by payment of such delinquency prior to sale, he merely pays a debt against his own property. Such distinction in law indicates that a certificate of sale was intended to convey to the purchaser more than a "mere lien," within the common understanding of that term as signifying only a claim of indebtedness against the property. It is in the latter sense that the 1945 amendment to section 2911 of the Civil Code would apply in its provision for extinguishment of a lien on which no action has been taken for enforcement prior to the terminative date of January 1, 1947.

Nor does it appear that the 1945 provision in said section 2911 of the Civil Code for the extinguishment of liens could reasonably be applied to the property interest evidenced by a certificate of sale and require it, as no more than a lien, to be converted into a deed prior to January 1, 1947. In Rombotis v. Fink, supra, 89 Cal.App.2d 378, 390–391, 201 P.2d 588, that legislation was held to be a valid statute of limitations as to preexisting bonds because it allowed a reasonable time for the holder of an assessment lien to take action for its enforcement. But within the 15½ months' period of grace allowed a lien claimant to act before the operative date of January 1, 1947, it would be impossible for him to complete sale proceedings on the delinquent assessment and likewise acquire a deed to the property in order to preclude extinguishment of the lien evidence by the certificate of sale. Assuming as noted in the Rombotis case, that the "minimum time required to complete a sale through a city or county treasurer under the improvement act is seven months", 89 Cal.App.2d at page 391, 201 P.2d at page 595, twelve months must then elapse before a deed can be acquired under the statutory redemption allowance, Sts. & Hy.Code, sec. 4346,—making a total period of at least nineteen months. Such an unreasonable application of the 1945 legislation in the curtailment of vested rights could not be sustained. Cf. Rombotis v. Fink, supra.

[6] Section 2911 of the Civil Code, as amended in 1945, makes no mention of a deed or when a deed should be issued in pursuit of sale proceedings which are timely undertaken. Subsequent legislation relating to this matter indicates that a certificate of sale was not contemplated as a lien affected by the presumption of extinguishment provided by the 1945 amendment.

At the time of the creation of the special assessment here involved and the sale of the property in satisfaction of the delinquency (1930), the only statutory provision regulating the time for issuance of a deed in pursuance of a certificate of sale was section 28 of the Street Opening Act of 1903, now codified in Sts. & Hy.Code, sec. 4346, declaring that a deed could be issued "at any time after the expiration of 12 months from the date of sale". While it appears that the legislature in 1945 undertook "a complete revisory plan with reference to the duration and extinction of assessment liens", Rombotis v. Fink, supra, 89 Cal.App.2d 378, 384, 201 P.2d 588, 591, so as to require the holders thereof to take timely action for enforcement of their liens, such legislation was held not to apply in extinguishment of an assessment lien on which sale proceedings had been commenced prior to the terminative date prescribed in the 1945 legislation—namely, January 1, 1947. Missler v. Sommer, supra, 1949, 92 Cal.App.2d 417, 206 P.2d 1116. Thereafter, July 22, 1949, section 801.11 of the Code of Civil Procedure was enacted to provide that if a deed was not issued prior to January 1, 1951, then "any certificate issued on sale made to satisfy any public improvement assessment * * * shall be presumed to have been paid and redeemed". And in 1951 said section 801.11 was amended to provide that if the deed was not issued prior to January 1, 1953, the presumption of payment and redemption would become conclusive.

[7–10] It is true that the 1949 legislation relating to the determination of an alleged property interest arising by reason of a certificate of sale and prescribing a time limitation for procurement of a deed thereon, Code Civ.Proc. secs. 801.1 to 801.15, was not effective until several months after the filing of the present actions (October 1, 1949). However, such later legislation brings into sharp focus the scope of the 1945 legislation as limited to a revision of the subject of the duration and extinguishment of assessment liens upon which no action or proceedings had been taken for their enforcement. If the interest created by a certificate of sale were intended to come within the presumption of extinguishment of assessment liens under the 1945 amendment to section 2911 of the Civil Code, then the addition of section 801.11 to the Code of Civil Procedure in 1949, and its amendment in 1951, would be superfluous enactments. But it cannot be assumed that the 1949 and 1951 legislatures indulged in idle acts. 23 Cal.Jur. sec. 158, p. 781; Scheas v. Robertson, supra, 38 Cal.2d 119, 129, 238 P.2d 982. Rather every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. Chilson v. Jerome, 102 Cal.App. 635, 640, 283 P. 862; cf. Boyd v. Huntington, 215 Cal. 473, 482, 11 P.2d 383. In construing these remedial statutes, all affecting the finality and security of land titles, it is proper to consider the history and purpose of the enactments, the previous state of the legislation on the subject, other statutes in *pari materia* and the benefits sought to be provided. 23 Cal.Jur. sec. 163, p. 785; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639, 122 P.2d 526. Moreover, as above noted, the 1949 legislation was enacted after the decision in Missler v. Sommer, supra, 92 Cal.App.2d 417, 206 P.2d 1116, holding the extinguishment of the lien provision under the 1945 amendment to section 2911 of the Civil Code inapplicable where sale proceedings had been instituted within the prescribed time. Presumably, the 1949 legislature had knowledge of this judicial decision and enacted the pertinent legislation in the light thereof. 23 Cal.Jur. sec. 159, p. 782; Sutter Hospital of Sacramento v. City of Sacramento, 39 Cal.2d 33, 244 P.2d 390.

[11] Here the deed in pursuance of respondent's certificate of sale was issued on June 20, 1949, some eighteen months prior to operation of the disputable presumption of payment and redemption under section 801.11 of the Code of Civil Procedure, as enacted in 1949, and some forty-two months prior to the operation of the conclusive presumption under the 1951 amendment to said section. As so validly issued following official sale proceedings brought to satisfy a delinquent assessment, respondent's deed stands on a parity with appellant's tax deed, the holders thereof becoming tenants in common, with the right to enforce their respective equitable liens against the property. The amount of respondent's lien appears to have been computed in accordance with the governing statutory provisions, Sts. & Hy. Code, secs. 4344, 4350, and the record contains no evidence, either oral or documentary, introduced by appellant in contest of the calculated amount. Likewise, respondent's evidence supports the propriety of the court's decree for sale of the property and partition of the proceeds in accordance with the parity principle. Accordingly, appellant's challenge of the respective judgments cannot be maintained. Monheit v. Cigna, supra, 28 Cal.2d 19, 168 P.2d 965; Elbert, Ltd. v. Nolan, supra, 32 Cal.2d 610, 197 P.2d 537.

The judgments are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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39 Cal.2d 756

WARD et al. v. JONES et al.

L. A. 22092.

Supreme Court of California, in Bank.

Oct. 24, 1952.

Rehearing Denied Nov. 20, 1952.

Action under wrongful death statute against employees of municipal corporation. The Superior Court, Los Angeles County, William B. McKesson, J., dismissed action after sustaining general demurrer without leave to amend, and plaintiff appealed. The Supreme Court, Shenk, J., held that statute requiring that person injured as result of negligence or carelessness of any public employee during course of employment, must present municipal corporation with claim in writing for damages within 90 days from accident, applies to action against municipal employees by heirs under wrongful death statute.

Judgment affirmed.

Carter and Edmonds, JJ., dissented.

Prior opinion 234 P.2d 98.

1. Death 🔑19

Statute requiring that person injured as result of negligence or carelessness of any public employee occurring during course of his employment must present municipal corporation with claim in writing for damages within 90 days, applies to actions by heirs under wrongful death statute against municipal employees, and absence of such notice precludes maintenance of action. Government Code, § 1981.

2. Death ⚷19

Complaint by heirs under death statute against employees of municipal corporation, which charged employees with having negligently and carelessly failed to remedy dangerous working conditions attending painting of high tension towers, and with negligently directing plaintiffs' decedent to paint one of such towers, sufficiently stated cause of action based on negligence within contemplation of statute requiring person injured by negligence of public employee during course of employment to present claim in writing for damages within ninety days, and such claim was prerequisite to maintenance of action. Government Code, § 1981.

3. Death ⚷19

Under statute requiring that person injured as result of negligence of public employee during course of employment, present municipal corporation with claim in writing for damages within ninety days, from date of accident when heirs who brought action against municipal employees under wrongful death statute had not filed required claim, court was not required to determine whether "accident" from which ninety day period was to be measured referred to event that gave rise to injury or to death, since in either event there had not been compliance. Government Code, § 1981.

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Richard L. Mayers and Lawrence William Steinberg, Beverly Hills, for appellants.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., Wendell Mackay and A. L. Lawson, Deputy City Attys., Los Angeles, for respondents.

SHENK, Presiding Justice.

This is an action for damages for wrongful death as authorized by section 377 of the Code of Civil Procedure. That section provides that "When the death of a person * * * is caused by the wrongful act or neglect of another, his heirs * * * may maintain an action for damages against the person causing the death * * *."

The plaintiffs are the widow and minor children of Joseph T. Ward, deceased. The complaint, later amended, was filed on March 29, 1949. The appeal is from a judgment of dismissal of the action following an order sustaining a general demurrer without leave to amend.

The decedent was a painter employed in the Department of Water and Power of the City of Los Angeles. On July 12, 1948, he was a member of a crew of department employees then engaged in painting an electrical transmission line tower. This tower supported high tension wires carrying an electrical potential of approximately 130,000 volts. While Ward and his fellow employees were engaged in the discharge of their departmental duties he was injured by coming in contact with a high tension wire and died two days later. The liability of the employer city was prescribed and limited by the death benefit provisions of Workmen's Compensation laws of the state, and the city is therefore not a party defendant in this action. The defendants were fellow employees of the decedent.

The complaint alleges that it was extremely hazardous for any painter to work on the transmission line towers when the wires were energized; that reasonable care required: that the current be turned off while painters worked on the towers; that neither painters, planks, scaffolding nor rigging, except of the non-conducting quality, be permitted to come within ten feet of the energized wires; that competent electrical mechanics be stationed at all times between the wires and painters working on the towers, and that painters be required to wear safety belts while so working.

It is also alleged that none of the foregoing precautions had been taken for a long period of time prior to the accident which caused Ward's death; that each of the defendants was aware of this fact, but in neglect and disregard of his duties as an employee of the department "carelessly and negligently" failed to take any steps to remedy the situation.

The complaint then alleges that the electrical mechanic assigned to the job insisted that certain precautions be provided to protect the painters from the dangers of the high tension wires but that the defendant O'Connor "in wilful, negligent and reckless" disregard of the safety of members of said crew, adopted the practice of working and did cause his painting crew to work in dangerous proximity to the high tension wires, without the protection of competent electrical mechanics; that on the day of the fatal accident the deceased was a member of the painting crew that was "negligently directed by the defendants" Williams and Phillips to paint the tower which was in dangerous proximity to the high tension wires.

A verified claim for damages stating the necessary information was filed with the City Clerk on October 8, 1948, by the plaintiff widow. The complaint does not allege that any claim for damages was presented to or served upon the defendants or any of them, and they received no actual notice that an action would be brought against them prior to the service of the complaint in this action.

Section 1981 of the Government Code provides: "Whenever it is claimed that any person has been injured or any property damaged as the result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment * * * within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the * * * municipality * * *."

It is the contention of the plaintiffs that section 1981 does not apply to actions for wrongful death. It may not be denied that if that section does apply to wrongful death cases a verified claim must be presented to an employee sought to be charged within 90 days after the accident. In Veriddo v. Renaud, 35 Cal.2d 263, at page 265, 217 P.2d 647, at page 648, it was said, that by section 1981 the legislature "has extended to public officers and employes, who incur liability in the performance of government service, the protection of a claims statute and the privilege of having defended at public expense those damage suits which are enumerated" in the Code. This court cited with approval the case of Huffaker v. Decker, 77 Cal.App.2d 383, 175 P.2d 254, in which the defendant city employee was sued for damages allegedly caused by the negligent driving of an automobile owned by the city and driven within the scope of the defendant's employment. It was held that the failure of the plaintiff to allege compliance with the claim provisions of section 1981 was fatal to his cause of action.

The plaintiffs contend that the section contemplates only a claim on behalf of the person injured; that an heir under the death statute can in no sense be deemed to be the person injured; that this concept is fortified by the use of the words "after the accident has occurred", and that thus the time of death as the time of the accident is excluded.

In an analogous situation this court has held that an heir of the deceased is a person injured within the terms of the death statute. In Arellano v. City of Burbank, 13 Cal.2d 248, 89 P.2d 113, the liability of the municipality in a wrongful death case pursuant to the Public Liability Act of 1923, Stats. 1923, p. 675, § 53051, Govt. Code, was sustained. Section 2 of the act there under consideration provided that in certain cases municipalities should be liable for "injuries" to persons and property resulting from dangerous or defective condition of public streets. In holding that the statute authorized the city's liability for wrongful death this court, 13 Cal.2d at page 258, 89 P.2d at page 119, cited and quoted with approval from Bennett v. Kings County, 124 Cal.App. 147, where it was said at page 150, 12 P.2d 47: "'Aside from the consideration of any other statutes, we are unable to see why the "injuries to persons," referred to in this statute, do not include such injuries as may be caused to persons by reason of the death of others as well as injuries to persons directly involved not resulting in death. We think the injury suffered by these plaintiffs is covered by the statute, and that the demurrer was properly overruled.'"

[1] A different intent should not be attributed to the use of the same language

in another section. An intent to include liability for injuries to persons and property flowing from wrongful death is read from the language in the section imposing liability. An intent to exclude the obligation to file a claim due to such injuries may not therefore be read from the similar language in section 1981 of the Government Code. As used in that section the language likewise is plain and sufficiently similar to warrant the conclusion that the legislature intended it to have the same meaning in each section. That language, referring to injuries to person and property, must be deemed to be all inclusive in both sections.

The Arellano case was decided in 1939. That a sufficient claim is required in cases of wrongful death has been thereafter assumed. See Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516; Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.2d 918; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993. With this construction placed upon the section the legislature has not seen fit to change the statutory requirements of presenting a claim in wrongful death cases.

[2] It is contended by the plaintiff that section 1981 applies only in cases of alleged "negligence and carelessness", that this complaint alleges something more in that the word "wilful" appears in one allegation and thereby excludes the cause of action from the operation of the section. This contention may not prevail. As above indicated it is alleged that by failing to take proper precautions to protect the painting crew the defendants "in violation, neglect and disregard of their various duties and responsibilities as officers and employees of said Department of Water and Power, carelessly and negligently failed to take any steps to remedy the same"; that the deceased was a member of a painting crew that "was negligently" directed by the defendants to paint one of the towers. As to the defendant A. J. O'Connor alone it is alleged that "in wilful, negligent and reckless" disregard of the lives and limbs of his crew, he had followed the practice of working and did cause his painting crew to work in dangerous proximity to said high tension wires; and that O'Connor's "practice" was with the knowledge, consent, authority and direction of his codefendants. Taking into consideration the complaint as a whole, wherein the same acts are alleged to constitute negligence and carelessness on the part of all of the defendants, the pleading states a cause of action based on negligence within the meaning of section 1981 and would be sufficient as such as against the general demurrer, but for the intervention of the claims statute.

[3] It is also urged that section 1981 is not applicable to this case because when death occurs as a result of the tortious act the time for presenting the claim is too uncertain. The section provides that the claim must be presented within ninety days after the "accident has occurred." It is argued that the "accident" is the occurrence causing the injury and that the injured party may die more than ninety days after the event causing the injury, thus making compliance with the time element impossible. It is unnecessary here to determine whether the word "accident" as found in the statute should be held to refer to the event that gave rise to the injury to the plaintiffs, namely, the death of the deceased, for the purpose of determining the commencement of the statutory period. Since the plaintiffs filed no claim at all against the defendants, a determination in that respect would not resolve any issue in this case.

It is concluded that the attempted cause of action against the defendants is based on negligence; that section 1981 is applicable; and that failure to comply therewith is fatal. Under these circumstances it does not appear that the complaint could be amended to state a cause of action.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

There can be no doubt that the various statutes imposing liability on government agencies include liability for wrongful death as well as injuries to persons and property and that they extend to cases where the injury is inflicted intentionally, wilfully, or through gross negligence as well as negligence. The claim statutes, however, do not cover the wrongful death actions. The subject is ably discussed by Mr. Presiding Justice White of the District Court of Appeal, Second District, Division One, in an opinion prepared by him when this case was before that court, which I adopt as my dissent, as follows:

> "A general demurrer to their amended complaint (hereinafter referred to as the complaint) having been sustained without leave to amend, plaintiffs have appealed from the ensuing judgment of dismissal. The action is one for wrongful death brought by the widow and minor children of Joseph T. Ward. The decedent met his death by coming in contact with a high tension electric transmission line while engaged as a painter in painting a tower at an electrical substation of the Department of Water and Power of the City of Los Angeles. The decedent was an employee of the department and the defendants were fellow employees having varying degrees of supervision over or connection with the work of painting the tower. The complaint alleged, in substance, that it was extremely dangerous for a painter to work on the tower in the vicinity of the high-voltage wires, and that reasonable care required that the current be turned off while such work went on; that there be two competent electricians present at all times; that no painters, nor any equipment except of a nonconducting quality be permitted within 10 feet of the wires while they were energized; that safety belts be used. It was charged that the defendants, in violation, neglect and disregard of their duties as officers and employees of the department, carelessly and negligently failed to take such precautions; further that defendants O'Connor and Williams, as foreman and assistant foreman of the painting crew, caused an electrical mechanic to be removed from the job in order to expedite the work by omitting the precautions insisted upon by the electrical mechanic and thereafter, 'in willful, negligent and reckless disregard of the lives and limbs of members of said crew, adopted the practice of working and did cause his painting crew to work in dangerous proximity to said high tension wires,' and 'to the knowledge and with the consent and authority and pursuant to the directions of' the other defendants.
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> "The demurrer was based upon the sole ground that the complaint failed to allege that the plaintiffs presented a verified claim to the defendants within 90 days from the date of the accident. The complaint in this connection contained the following allegation: 'That on October 8, 1948, plaintiff Aileen Mary Ward filed a written verified claim for damages with the City of Los Angeles, State of California by filing same with Walter Peterson, City Clerk of said City; that said claim for damages specified the names and addresses of the claimants, the nature of the damages and injuries, when and where the injuries occurred, and a description of the manner and nature of the accident and injuries.'
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> "Section 1981 of the Government Code reads as follows:
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> > 'Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim

shall be filed with the officer and the Governor.'

"Appellants present three reasons why, they assert, the causes of action here involved do not come within the requirements of the aforesaid section 1981: 1. That an action for wrongful death is not included within the wording of the section, which refers only to situations where 'it is claimed that any person has been injured or any property damaged'; 2. That the section by its terms does not include cases involving wilful misconduct, appellants here contending that they have set forth a cause of action for wilful misconduct rather than mere negligence; and 3. That the statute should not be construed to include an action by an injured employee against a fellow employee.

"As a fourth ground of reversal, appellants assert that even though section 1981 should be held applicable in the instant action, their filing of a claim with the city clerk of the city of Los Angeles should be held to constitute substantial compliance.

"The majority view of the courts of other jurisdictions as reflected in cases we consider as exceptionally well reasoned, is that statutes containing language similar to that involved in the section here under consideration do not apply to an action for wrongful death. The language of the Supreme Court of Missouri in Glasgow v. City of St. Joseph, 1944, 353 Mo. 740, 748, 184 S.W. 2d 412, 416, is illustrative: 'Unless actions for death by wrongful act, are explicitly included, it is generally held that like statutory provisions do not apply to an action for wrongful death. This is especially so where, as in Missouri' (and as in California), 'the wrongful death action is considered a new cause of action, first springing into existence at the time of death.' Citing 25 C.J.S., Death § 30, subsection a, p. 1102; 38 Am.Jur., p. 392, § 688; 6 McQuillin, Municipal Corporations, p. 1285, § 2890, n. 12; Annotation, 64 A.L.R. 1059.

"The case of Spangler's Administrator v. City of Middlesboro, 1945, 301 Ky. 237, 191 S.W.2d 414, 415, involved a statute providing that 'No action shall be maintained against any city * * * unless notice * * * be filed within ninety days of the occurrence for which damage is claimed. * * *' The court there pointed out that where an injured party dies, the usual necessity for prompt examination to determine exact extent of injuries is obviated and the coroner's inquest provides the city with ample notice for the purpose of eliminating for the future the dangerous condition which caused the death. But further, as pointed out by the Kentucky court, the notice is required to be filed within 90 days of the 'occurrence' for which damages are claimed. The California statute uses the word 'accident.' Clearly, so far as an action for personal injuries is concerned, the words 'occurrence' and 'accident' mean the same thing—the incident or event causing the personal injuries, such as the incident of a collision of automobiles, the incident of falling into an excavation, etc. As stated in the last cited case, if it were held that notice were necessary to the maintenance of an action for wrongful death, the action would be barred where the 'injury'—that is the 'accident' or 'occurrence' occurred more than 90 days before death.

"The language of the Supreme Court of Vermont in Bigelow v. Town of St. Johnsbury, 1918, 92 Vt. 423, 105 A. 34, 38, is here appropriate: 'It is argued that * * * persons financially injured through the death of their next of kin must give notice the same as they would be required to give if they were themselves physically injured. The absurdity of such a construction is manifest from its logical result. If a person injured is, in consequence thereof, berefit of his reason, and the injuries result in his death 21 days after the occurrence of such injury, no action can be held or maintained, under the statute, for the benefit of the next of kin, because notice was not given within 20 days of the time of the injury, during all which time the injured person was yet alive. An absurd purpose is not to be attributed to the lawmakers, and a construction leading to an absurd consequence must always be avoided.'

"Another Vermont case illustrative of the difficulties that would be involved were the statute held applicable is Eames v. Town of Brattleboro, 1882, 54 Vt. 471, where the person injured died within half an hour after the accident. Recovery was sought on behalf of two minor daughters, no claim or notice having been filed. The court said: 'We think there is no room for doubt that no notice was required in this case. The language is plain and the effect of it unmistakable. The "person injured", as used in the proviso, refers to the person injured in the accident, not to the person injured pecuniarily, as a result of the accident.'

"We will refer further to the meaning in section 1981 of the words 'whenever it is claimed that any person has been injured' in discussing respondents' contentions with respect to the applicability of the statute.

"Other cases holding typical claims statutes to be inapplicable to wrongful death actions, many involving statutes containing much broader language than that involved in the instant case, are Diariotti v. Missouri Pac. Ry. Co. (1914) 262 Mo. 1, 170 S.W. 865; Nesbit v. City of Topeka, 1912, 87 Kan. 394, 124 P. 166, 40 L.R.A.,N.S., 749; Orth v. Belgrade, 1902, 87 Minn. 237, 91 N.W. 843; Senecal v. City of West St. Paul, 1910, 111 Minn. 253, 126 N.W. 826; Parish v. Town of Eden, 1885, 62 Wis. 272, 22 N.W. 399; McKeigue v. City of Janesville, 1887, 68 Wis. 50, 31 N.W. 298; Laconte v. City of Kenosha, 1912, 149 Wis. 343, 135 N.W. 843; Knight v. Town of Haverhill, 1915, 77 N.H. 487, 93 A. 663; Perkins v. Inhabitants of Oxford, 1877, 66 Me. 545; Prouty v. City of Chicago, 1911, 250 Ill. 222, 95 N.E. 147; Devine v. City of Chicago, 1911, 166 Ill.App. 17.

"Respondents urge that the language 'person * * * injured' includes injury resulting from the wrongful death of another, and that this view is supported by the interpretations, expressed or assumed, of similar language in related statutes, in decisions of the courts of this state. In this connection, it is said that the various statutes[1] on the subject of the liability of cities, public agencies, and their officers, and the filing of claims therefor, 'must all be read together and so construed, the liability of a city or its agents must be determined and the procedure therein set forth must be followed.' Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623, 624. See also Shannon v. Fleishhacker, 116 Cal.App. 258, 2 P.2d 835; Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Ansell v. City of San Diego, 35 Cal.2d 76, 216 P.2d 455; Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 57 P.2d 226; Tyree v. City of Los Angeles, 92 Cal.App.2d 182, 206 P.2d 912.

"Section 53051 of the Government Code (formerly Stats.1923, p. 675) provides that counties, municipalities and school districts 'shall be liable for injuries to persons and property. * * *' In Arellano v. City of Burbank, 13 Cal.2d 248, 89 P.2d 113, 119, it was expressly held that 'injuries to persons' referred to in the statute, include such injuries as may be caused to persons by reason of the death of others. Further it is pointed out by re-

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"[1] Act of 1923 (Stats.1923, p. 675), making cities and other public agencies liable for negligence in certain instances. Now substantially incorporated in section 53051, Government Code.

"Act of 1919 (Stats.1919, p. 756), relating to liability of officers of cities and other public agencies. Now incorporated in section 1953, Government Code.

"Act of 1931 (Stats.1931, p. 2475), requiring filing of claims with clerk of the legislative body of a city or public agency. Now section 53052, Government Code."

spondents, in such cases as Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353, and Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320, it was held that a recovery could not be had under the provisions of section 53051 of the Government Code unless a claim is filed as required by section 53052 of the same code, which latter section provides (as does section 1981), 'Whenever it is claimed that a person has been injured * * * a * * * claim for damages shall be * * * filed * * *.' However, no case has been found in which it has been squarely held that a claim must be filed under section 53052 in a death action arising under section 53051. Respondents urge that since these pertinent statutes (Gov.Code, §§ 1981, 1953, 53051 and 53052) were reenacted as part of the Government Code after the decision in Arellano v. City of Burbank, supra, it must be presumed that the Legislature intended them to apply to death cases.

"The cases of Dillard v. County of Kern, 23 Cal.2d 271, 144 P.2d 365, 150 A.L.R. 1048, and Shannon v. Fleishhacker, 116 Cal.App. 258, 2 P.2d 835, are of no particular assistance in the solution of the question here presented. The former case involved section 4075 of the Political Code, which required that 'all claims' against a county should be presented as therein provided, while in the latter case the court was concerned with whether the plaintiff had proved the elements of liability required under the statute then in force (Stats.1919, p. 756; 2 Deering's Gen. Laws, Act 5618). The same is true with reference to cases involving wrongful death actions against the city of Los Angeles, Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993, 997; Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.2d 918, as these cases involved a charter provision that 'No suit shall be brought on *any* claim * * * until a demand for the same has been presented * * *.'

"Thus, while a statute imposing liability for 'injuries to persons' has been construed to include liability for wrongful death, Arellano v. City of Burbank, supra, and cases cited, and while it has been sometimes assumed that a statute requiring the filing of a claim as a prerequisite to suit includes a suit for wrongful death, in no case has it been held that the provisions of section 1981, requiring the filing of a claim 'whenever it is claimed that *any person has been injured* * * * within 90 days after the accident has occurred' apply to a wrongful death situation. Nor does it necessarily follow that because the phrase 'injuries to persons' as used in a statute imposing liability has been construed to include wrongful death, the language of section 1981 should be construed to require the filing of a claim as a prerequisite to the maintenance of an action for wrongful death.

"It is manifest from the plain wording of section 1981 that it was the intention of the Legislature to qualify the common law right of action against the negligent person by requiring the filing of a verified claim only in the event the *injured person* claims that he has been injured as a result of the negligence of a public employee occurring during the course of the latter's public employment. Had it been the intention of the Legislature to extend the provisions of this section to another, new and different cause of action which comes into existence at the time of death of the injured person, appropriate language could, and no doubt would, have been used. Courts should not, under the guise of judicial interpretation, attempt to add to or detract from the legislative intent as expressed in the words of a statute. This is especially true when, as the Supreme Court said in the recent case of Stewart v. McCollister, 37 Cal.2d [203, 207] 231 P.2d 48, 'The several claims statutes and charter provisions prescribing varying requirements concerning the

> length of time for the filing of verified claims, the contents thereof, and the manner of filing or presentation may well be said to have become traps for the unwary. No additional trap should be added by an unwarranted construction of said section 1981.' We are unwilling to give our imprimatur to a strained construction of the section by applying it to a cause of action which, from a reading of the section's terms, is not included within its purview.
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> "In view of the foregoing conclusion at which we have arrived, we deem it unnecessary to discuss or decide other points made and issues raised upon this appeal.
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> "The judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer and try the cause upon the merits."

For the reasons above stated I would reverse the judgment.

EDMONDS, Presiding Justice (dissenting).

I am in agreement with the conclusions of the District Court of Appeal that a cause of action for wrongful death does not come within the purview of the claim statute and the judgment should be reversed. The reasoning of that court made unnecessary discussion of other questions presented by the parties. However, the contrary conclusion now reached upon the applicability of the statute to a cause of action for wrongful death requires consideration of the contention that the statute also is inapplicable to a cause of action based upon wanton and reckless misconduct. The question should not be evaded upon the ground that the complaint states a cause of action for negligence alone and could not be amended to state one for wanton and reckless misconduct.

As I read the complaint, the opinion does not accurately summarize the plaintiffs' allegations. According to the pleading, it was extremely dangerous for a painter to work on the towers in the vicinity of "hot wires" and certain specialized safety precautions were required. None of these precautions was observed. The electrical mechanic assigned to the job "insisted on certain necessary precautions * * * which if taken would somewhat slow down the painting job and increase its costs". O'Connor, the complaint continues, "for the purpose of being able to proceed with said job with such expedition and cost as he desired, caused the removal of said Electrical Mechanic from the job, and thereafter, in willful, negligent and reckless disregard of the lives and limbs of members of said crew, adopted the practice of working and did cause his painting crew to work in dangerous proximity to said high tension wires, without the aforesaid protection of competent Electrical Mechanics, to the knowledge and with the consent and authority and pursuant to the directions" of the other defendants.

The allegations of the complaint are sufficient to state a cause of action for wanton and reckless misconduct. "A tort having some of the characteristics of both negligence and willfulness occurs when a person with no intent to cause harm intentionally performs an act so unreasonable and dangerous that he knows, or should know, it is highly probable that harm will result. Rest. Torts, sec. 500 et seq.; Prosser, Torts, pp. 260, 261. Such a tort has been labelled 'willful negligence', 'wanton and willful negligence', 'wanton and willful misconduct', and even 'gross negligence'. It is most accurately designated as wanton and reckless misconduct. It involves no intention, as does willful misconduct, to do harm, and it differs from negligence in that it does involve an intention to perform an act that the actor knows, or should know, will very probably cause harm. (Citations.) Wanton and reckless misconduct is more closely akin to willful misconduct than to negligence, and it has most of the legal consequences of willful misconduct. Thus, it justifies an award of punitive damages, and contributory negligence by the plaintiff is not a defense." Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 869–870, 118 P.2d 465, 468.

As examples of conduct which is in reckless disregard of the safety of another, the Donnelly case cites New York Central R. R. Co. v. Mohney, 252 U.S. 152, 40 S.Ct. 287, 64 L.Ed. 502, involving a collision between railroad trains after the engineer of one had run his train past two separate danger signals. Another example given is the operation of a bus over a dangerous railroad crossing at a rate of 55 to 60 miles per hour. Virginia Beach Bus Line v. Campbell, 4 Cir., 73 F.2d 97. "Such conduct constitutes more than negligence. It is a dangerous act performed intentionally with the knowledge that it will probably cause harm." Donnelly v. Southern Pacific Co., supra, 18 Cal.2d at page 870, 118 P.2d at page 469.

In Vega Aircraft v. Industrial Accident Comm., 27 Cal.2d 529, 165 P.2d 665, 668, a finding of "serious and wilful misconduct of the employer" by the commission was upheld on evidence which showed a failure by supervisory employees to take the proper safety precautions in conducting experimental work of an extremely dangerous nature. The court said: "Serious and wilful misconduct is conduct which the employer knew, or should have known, was likely to result in serious injury or which evinced reckless disregard for the safety of the employee." 27 Cal.2d at pages 533–534, 165 P.2d at page 667.

"Serious and willful misconduct is conduct that the employer knew, or should have known, was likely to cause serious injury, or conduct that evinces a reckless disregard for the safety of others. (Citations.) It has been held repeatedly that the employment of workmen under dangerous conditions that can be guarded against constitutes a reckless disregard for their safety. (Citations.) The test under these cases is whether the employer knowingly or willfully committed an act that he knew or should have known was likely to cause harm to his employee." Parkhurst v. Industrial Accident Comm., 20 Cal.2d 826, 829–830, 129 P.2d 113, 115; Hatheway v. Industrial Accident Comm., 13 Cal.2d 377, 381, 90 P.2d 68.

The complaint in this case alleges all of the elements necessary to constitute the tort of "Wanton and reckless misconduct", as it is called in the Donnelly case, supra, or of "wilful misconduct", the designation more generally applied to it in the decisions and statutes. Rest., Torts, § 500, Special Note. Here the defendants, it is alleged, knew the danger and deliberately failed to provide, or even removed, the proper safety procedures. This is far more than a simple allegation of negligence although negligence may be included within the scope of the pleading. If the facts alleged are proved, a judgment based upon wanton and reckless misconduct would be warranted. The situation is not one where the plaintiffs attempt to evade the claim statute by formally alleging that negligent acts also were "wilful". They allege all of the facts necessary to support a finding of wilful misconduct. This belies the implication of the majority opinion that the allegation of wilfulness was mere formalism.

Even if it may correctly be concluded that the complaint states a cause of action for negligence only, it is obvious from the facts alleged that the plaintiffs could state a cause of action for wanton and reckless misconduct. "Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to obviate the objections thereto it is error to refuse permission to amend." Hillman v. Hillman Land Co., 81 Cal.App.2d 174, 181, 183 P.2d 730, 735; People v. Turlock Home Telephone, etc., Co., 200 Cal. 546, 550, 253 P. 1108; Payne v. Baehr, 153 Cal. 441, 447–448, 95 P. 895; Photochart v. Del Riccio, 94 Cal.App.2d 315, 319, 210 P.2d 547. Under the circumstances, the general demurrer should not have been sustained without leave to amend.

By basing the judgment upon the conclusion that the complaint states a cause of action for negligence only, the majority implicitly concede that wilful misconduct is not included within the provisions of section 1981 of the Government Code. No other interpretation of the statute is possible. By its express terms, it applies only to "negligence or carelessness". "Wilful misconduct" is not included.

Statutes in derogation of the common law will be strictly construed. McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909; Callet v. Alioto, 210 Cal. 65, 70, 290 P. 438. At common law, the public employee was liable for his tortious act. Perkins v. Blauth, 163 Cal. 782, 789, 127 P. 50; Doeg

v. Cook, 126 Cal. 213, 216–217, 58 P. 707; cf. Elliott v. County of Los Angeles, 183 Cal. 472, 474, 191 P. 899; Moore v. Burton, 75 Cal.App. 395, 401, 242 P. 902. Government Code section 1981 places a procedural requirement upon the maintenance of the previously existing cause of action. Veriddo v. Renaud, 35 Cal.2d 263, 266, 217 P.2d 647; Huffaker v. Decker, 77 Cal.App. 2d 383, 389, 175 P.2d 254. This limitation upon the common law cause of action should be strictly construed. It should not be extended to causes of action other than those specifically encompassed within the terms of the statute.

This court consistently has followed the general rule that "wilful misconduct" is much more than "negligence". It is the intentional doing of an act, rather than failure to perform a duty. The distinction is basic, not merely technical. The two types of conduct are essentially different. "Wilful misconduct" is not "negligence". As recently as Benton v. Sloss, 38 Cal.2d 399, 403, 240 P.2d 575, the court, interpreting Vehicle Code sections 402 and 403, distinguished between "negligence" and "wilful misconduct", holding that the latter is not included within the former.

The Benton case relies upon Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L. R. 407, which reviews at length the cases distinguishing the two separate types of conduct. There, the court was faced with the question whether "wilful misconduct" in section 141¾ of the Vehicle Act (now Vehicle Code § 403) is the same as "negligence" in section 1714¼ of the Civil Code (now Vehicle Code § 402). It held that the two types of conduct were different. In reaching its conclusion it relied upon cases drawing the distinction in the general field of tort law as well as upon decisions construing the motor vehicle statutes. To emphasize its point that the Legislature understood the difference, it mentioned in passing the use of both "negligence" and "wilful misconduct" in Vehicle Code section 352, relating to liability for the acts of a minor.

Civil Code section 1714 draws the distinction between the two types of conduct by separately describing acts giving rise to liability. It provides: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. * * *"

Donnelly v. Southern Pacific Co., supra, provides a graphic explanation of the difference between negligence and wilful misconduct and of the varying degrees of negligence. The question involved was whether certain actions constituted wilful misconduct, the only basis upon which liability could be predicated, or whether they were merely negligence, even though of a high degree. The court said: "Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. (Citations.) A negligent person has no desire to cause the harm that results from his carelessness (citation). And he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. (Citation.) Willfulness and negligence are contradictory terms. (Citations.) If conduct is negligent, it is not willful; if it is willful, it is not negligent." 18 Cal.2d at page 869, 118 P.2d at page 468. Otherwise stated, the conduct being considered, said the court, may have been "gross" under the California rule, but it constituted negligence and not wanton and reckless misconduct.

Prior to the adoption of chapter 1168, Statutes of 1931, upon which section 1981 is based, the distinction between "negligence" and "wilful misconduct" had been clearly drawn by the courts. In Malone v. Clemow, 111 Cal.App. 13, 295 P. 70, it was said: "We should not confuse 'gross negligence' with 'wilful misconduct,' because there is a clear distinction between the two terms." 111 Cal.App. at page 17, 295 P. at page 72. Reviewing the authorities, the court held that "whenever the element of *knowledge* and *willfulness* enters into the act, *it ceases to be negligence,* and becomes at least, 'willful misconduct,' and this is true no matter what degree of negligence is being considered." 111 Cal.App. at page 17, 295 P. at page 72.

"When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction." Perry v. Jordan, 34 Cal.2d 87, 93, 207 P.2d 47, 50; City of Long Beach v. Payne, 3 Cal.2d 184, 191, 44 P.2d 305. The frequent definitions of "negligence" as distinguished from "wilful misconduct", and the application of the definition to liability "resulting from negligence" in section 1714¼ of the Civil Code (now § 402, Vehicle Code), indicate a legislative intent to give a similar construction to "as a result of the negligence" in section 1981.

Therefore, even if it may correctly be held that a cause of action for wrongful death is included within the terms of the statute, the demurrer was sustained improperly. The complaint is based upon a cause of action for wanton and reckless misconduct, for which no claim is required.

For this reason, as well as those stated by the District Court of Appeal, I would reverse the judgment.

Rehearing denied; EDMONDS and CARTER, JJ., dissenting.

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39 Cal.2d 807

EADS et al. v. MARKS et al.

L. A. 22357.

Supreme Court of California, in Bank.
Oct. 28, 1952.

Action for injuries sustained by small child when he fell from porch and broke milk bottle allegedly left there by defendant dairy in violation of agreement entered into with child's parents for benefit of child. The Superior Court, Los Angeles County, William B. McKesson, J., sustained demurrer to amended complaint without leave to amend and entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Carter, J., held that complaint stated a cause of action in tort for negligent breach of contractual duty to child.

Judgment reversed.

Prior opinion, 241 P.2d 582.

1. Contracts 🔑333(7)

Implicit in allegation that parents of small child had directed dairy to leave no dairy products at residence except in refrigerator because if glass containers were left within reach of child he might be injured and that dairy had agreed to remove empty glass containers from porch was the allegation that such agreement was made expressly for benefit of child as third party beneficiary.

2. Pleading 🔑246(2)

In action against dairy for injuries sustained by small child when he picked up milk bottle, allegedly left on porch by defendant dairy in violation of agreement with child's parents, and fell from porch breaking bottle, failure to allege consideration for agreement not to leave glass containers on porch could be remedied by amendment.

3. Contracts 🔑56

Promise to continue buying dairy products from particular dairy rather than from another firm would constitute consideration for agreement by dairy not to leave glass milk containers on customer's porch.

4. Action 🔑27(1)

The same act may constitute both a tort and a breach of contract and, even where a contractual relationship exists between the parties, a cause of action in tort may arise out of negligent manner in which contractual duty is performed or out of a failure to perform such duty.

5. Action 🔑27(2)

Agreement by dairy for benefit of customer's small child not to leave glass containers on customer's back porch was of significance only in creating legal duty of care, and alleged negligence of dairy in leaving milk bottle on back porch, where small child picked it up and was injured, should be considered as a tort governed by tort rules and not as a breach of contract.

6. Action ⚷27(1)

Where cause of action arises from breach of a promise set forth in contract, the action is "ex contractu", but where it arises from a breach of duty growing out of contract, it is "ex delicto".

See publication Words and Phrases, for other judicial constructions and definitions of "Ex Contractu" and "Ex Delicto".

7. Action ⚷28

Contractual negligence ordinarily gives rise to an action either on contract or in tort, and injured party may at his election waive the contract and sue in tort, or he may waive the tort and sue on the contract alone.

8. Action ⚷27(1)

Actions based on negligent failure to perform contractual duties, though containing elements of both contract and tort, are generally regarded as delictual actions, since negligence is considered the gravaman of the action.

9. Negligence ⚷62(1)

Independent intervening action of small child in falling from porch with milk bottle allegedly left there by defendant dairy in violation of agreement with child's parents not to leave glass containers on porch was readily foreseeable and should have been anticipated and did not break the chain of causation so as to relieve dairy from liability for resulting injury to child.

10. Negligence ⚷62(1)

Where intervening act is reasonably foreseeable, chain of causation is not broken and original actor remains liable.

11. Appeal and Error ⚷917(1)

On appeal from judgment for defendant entered after demurrer to amended complaint had been sustained without leave to amend, allegations of amended complaint must be taken as true.

12. Negligence ⚷19

Under agreement by dairy not to leave glass containers on customer's porch because customer's small child might be injured by picking up, dropping or tripping over such containers, dairy owed a duty of care to child, and was liable in tort for breach of such duty resulting in injury to child.

13. Negligence ⚷114

Allegation that defendant dairy negligently and wrongfully placed, left and permitted a glass milk container to remain upon customer's back porch in violation of agreement with customer for benefit of customer's small child and that child picked up container and fell from porch causing container to break and injure child sufficiently alleged that defendant dairy's negligence was the proximate cause of injury.

14. Pleading ⚷225(2)

Where first amended complaint alleged facts showing a duty of care owed by defendant dairy to customer's small child under agreement with customer, negligent breach of such duty, and injury to child as a proximate result of such negligence, and alleged deficiencies in complaint could be obviated by amendment, complaint stated a cause of action in tort for negligent breach of contractual duty to child, and sustaining demurrer to complaint without leave to amend was abuse of discretion.

15. Pleading ⚷225(2)

Where complaint states a cause of action, sustaining demurrer thereto without leave to amend constitutes abuse of discretion even though complaint is subject to special demurrer because of defects in the form of the pleading.

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Robert H. Green, Los Angeles, for appellants.

Jennings & Belcher and George M. Henzie, Los Angeles, for respondent.

CARTER, Justice.

Plaintiffs, Rand Edison Eads, a two year old minor child, through his father and guardian ad litem, Harold Madison Eads, and Harold Madison Eads, sued defendant Creameries of America (sued as Doe One) for damages for personal injuries allegedly suffered by said minor child because of the negligence of defendant, its agents, servants and employees.

Defendant's (Creameries of America) general and special demurrer to plaintiffs' first amended complaint was sustained without leave to amend and judgment thereon was entered in favor of defendant.

In plaintiffs' amended complaint it was alleged (in part): "That at all times from on or about December 20, 1947 continuously to August 12, 1949, the plaintiffs, Harold Madison Eads, *and* (sic) been and was a customer of defendants, and at all times there had been a delivery service maintained and conducted by defendants wherein defendants had supplied and delivered to plaintiffs at plaintiffs' said place of residence, milk, cream, butter, eggs and other dairy products for a valuable consideration and at the prices established by defendants therefor.

"That on or about December 1, 1948, at which time the said plaintiff, Rand Edison Eads, was of the approximate age of one year, the defendants and each of them were informed by the plaintiff, Harold Madison Eads, and by Lenore Eads, the wife of said plaintiff, that no dairy products, *glass containers,* milk or milk bottles were to be left at the said residence of plaintiffs except in the refrigerator in the house, and that all empty milk bottles and *glass* containers for the defendants would be left within the house. That at said time plaintiff, Harold Madison Eads, and his said wife informed the defendants that if said dairy products or the containers therefor were left within the reach of the minor child that said minor child might be injured by picking up, dropping or tripping over such dairy products and/or the *glass* containers therefor*e* (sic), and further informed the defendants and each of them that in the absence of plaintiffs, empty *glass* containers would be placed upon the back porch of said residence with a memorandum or note stating that no milk or dairy products were to be left; and the defendants and each of them (*agreed to said request and*) informed the plaintiff, Harold Madison Eads, and his said wife that none of said products or *glass* containers therefor would be left except within said refrigerator, and that empty *glass* containers would be removed by defendants *from the back porch,* and not left at said residence upon the regular delivery times; that on or about August 12, 1949, defendants and each of them negligently, carelessly and wrongfully placed, deposited, *left,* and permitted to remain a *glass* milk container upon the back porch of said residence, and the said minor plaintiff, picked up said container and fell off the [said] porch, causing the container to break within close proximity to his face; that as a direct and proximate result of the negligent and wrongful acts of the defendants the said Rand Edison Eads was caused to suffer severe and permanent injuries, pain and suffering, all to his damage in the sum of $25,000.00."

Defendant demurred on the ground that the complaint did not contain facts sufficient to constitute a cause of action, and that it was uncertain in that it did not contain facts showing wherein any duty was owed to the minor plaintiff, in what manner any act or omission of defendant was a proximate cause of plaintiffs' injury, what consideration may have existed to support any agreement with any plaintiff for the removal of empty bottles, whether defendants are charged with placing or depositing the milk bottle on the porch or permitting one to remain there, whether the milk container involved was full (as delivered by defendant) or empty (as having been in the possession of plaintiffs), whether defendant is charged with permitting the milk bottle to remain on the porch and whether the time was a "milk delivery time."

The underlined portions of the complaint constitute the amendments made by plaintiffs. Although there is nothing in the record to substantiate the statement, plaintiffs contend that the amendments were made at the direction of the trial court upon the hearing and argument on the original complaint.

[1-3] Plaintiffs have alleged an agreement made with defendant and, implicit therein, is the allegation that it was made expressly for the benefit of their minor child, the third party beneficiary thereof. Walsh v. Walsh, 42 Cal.App.2d 282, 285, 108 P.2d 760; Le Ballister v. Redwood Theatres, 1 Cal.App.2d 447, 36 P.2d 827. It is true that no consideration for the contract was alleged, but that was a deficiency which plaintiffs might have been able to supply by amendment. The consideration for such

agreement may well have been the plaintiffs' promise to continue to buy dairy products from defendant rather than from another firm.

[4-8] Assuming that there was a valid agreement for the benefit of plaintiffs' minor child, defendant next contends that plaintiffs have no cause of action in *tort* for the failure to perform. The same act may be both a tort and a breach of contract. L. B. Laboratories, Inc., v. Mitchell, 39 Cal.2d 56, 244 P.2d 385. Even where there is a contractual relationship between the parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed, or out of a failure to perform such duty. Green v. Hanson, 103 Cal.App. 430, 284 P. 1082; Jones v. Kelly, 208 Cal. 251, 280 P. 942; Wetzel v. Pius, 78 Cal.App. 104, 248 P. 288. Here, the duty of care arose by reason of the contract, and plaintiff has sued in tort for the breach of that duty. The contract is of significance only in creating the legal duty, and the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by tort rules. Rushing v. Pickwick Stages System, 113 Cal.App. 240, 298 P. 150; Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 P. 993. As was said in Peterson v. Sherman, 68 Cal.App.2d 706, 711, 157 P.2d 863, 866: "It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises *from a breach of duty growing out of the contract* it is ex delicto. * * *" See, also, Jones v. Kelly, supra, 208 Cal. 251, 254-255, 280 P. 942. Where the cause of action arises from the breach of a contractual duty, the action is delictual notwithstanding that it also involves a breach of contract. Jones v. Kelly, supra; Peterson v. Sherman, supra. Defendants maintain that there can be no action in tort because there is no general duty of care arising out of the vendor-vendee relationship. In situations such as this, there is contractual negligence or the breach of a primary duty owed to the injured party, the duty arising out of the contract. A tort may grow out of or be coincident with a contract, and the existence of a contractual relationship does not immunize a tortfeasor from tort liability for his wrongful acts in breach of the contract, Jones v. Kelly, supra, 208 Cal. 251, 280 P. 942. Contractual negligence ordinarily gives rise to an action either on contract or in tort, and the injured party may at his election waive the contract and sue in tort, Loup v. California Southern R. R. Co., 63 Cal. 97, 99; Richardson v. Pridmore, 97 Cal.App.2d 124, 217 P.2d 113, 17 A.L.R.2d 929; or waive the tort and base his action on the contract alone, Singley v. Bigelow, 108 Cal.App. 436, 444, 291 P. 899; L. B. Laboratories, Inc., v. Mitchell, supra, 39 Cal.2d 56, 244 P.2d 385; 2 Cal.Jur.2d, Actions, § 29. In general, however, it has been held that actions based on negligent failure to perform contractual duties, such as those owing from a hospital, Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98, or physician, Denning v. State, 123 Cal. 316, 55 P. 1000, to a patient, from an employer to an employee, Krebenios v. Lindauer, 175 Cal. 431, 166 P. 17, from a landlord to a tenant, Jones v. Kelly, supra, although containing elements of both contract and tort, are regarded as delictual actions, since negligence is considered the gravamen of the action.

[9, 10] Defendant contends that the complaint is insufficient in that there is nothing to show what act or omission attributable to it was the proximate cause of the injuries sustained by the minor plaintiff. Plaintiffs allege that defendants "and each of them negligently, carelessly and wrongfully placed, deposited, left, and permitted to remain a glass milk container upon the back porch of said residence, and the said minor plaintiff, picked up said container and fell off the porch, causing the container to break within close proximity to his face; that as a direct and proximate result of the negligent and wrongful acts of the defendants the said Rand Edison Eads was caused to suffer" etc. Although the injury resulted from the independent intervening action of the child, such occurrence was readily foreseeable and should have been anticipated. Where the intervening act is reasonably foreseeable, the chain of causation is not broken, and the original

actor remains liable. Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872; Osborn v. City of Whittier, 103 Cal.App.2d 609, 230 P.2d 132. Here, the precise injury occurred which plaintiffs, by their agreement, sought to prevent.

[11–15] Taking the allegations of the complaint as true, as we are bound to do, Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 41, 172 P.2d 867, it is our opinion that the agreement between plaintiffs and defendant created a duty of care on the part of defendant toward plaintiffs' minor child, that plaintiffs properly sued in tort for the breach of that duty, and that there was a sufficient allegation that defendant's negligence was the proximate cause of the child's injuries. The other points raised by defendant in its demurrer might have been obviated by amendment, and we are therefore of the opinion that the trial court abused its discretion in sustaining the demurrer without leave to amend. As this court said in Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 718, 719, 128 P.2d 522, 525, 141 A.L.R. 1358: "Where a complaint is sufficient against a general demurrer, however, and any uncertainties or ambiguities in the pleading can be corrected by amendment, it is apparent that denial of leave to amend results in a disposition of the cause upon technical grounds alone. The plaintiff who has stated a cause of action in such a case is denied a trial on the merits of his action if any of the grounds of special demurrer are well taken, despite the fact that the deficiencies can be corrected. It has been held, under such circumstances, that denial of leave to amend constitutes an abuse of discretion even though it be conceded that the trial court had authority to sustain the special demurrer because of defects in the form of the pleading. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1; Olivera v. Grace, 19 Cal.2d 570, 579, 122 P.2d 564 [140 A.L.R. 1328]; and cases cited therein. * * *" Wilkerson v. Seib, 20 Cal.2d 556, 127 P.2d 904; Photochart v. Del Riccio, 94 Cal.App.2d 315, 210 P.2d 547; Davis v. Wood, 61 Cal.App.2d 788, 143 P.2d 740.

We therefore hold that it was an abuse of discretion for the trial court to sustain the demurrer without leave to amend. We do not decide, however, that the complaint was not subject to special demurrer, and the trial court may in its discretion require the clarification of uncertainties or ambiguities in the complaint.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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39 Cal.2d 822

FAROLE v. EICHMAN et al.

L. A. 22372.

Supreme Court of California, in Bank.

Oct. 31, 1952.

Action for injuries sustained by 14 year old boy while riding on handlebars of bicycle when it was struck by defendants' truck at street intersection. The Superior Court, Los Angeles County, Percy Hight, J., pro tem., rendered judgment on a verdict for plaintiff, and defendants appealed. The Supreme Court, Gibson, C. J., held that questions as to whether plaintiff was contributorily negligent were properly for jury.

Judgment affirmed.

Prior opinion, 242 P.2d 346.

1. Negligence 🔑82

Violation of a city ordinance, even if it constitutes negligence per se, does not bar recovery for injuries resulting from negligence of another, unless such violation of ordinance was a proximately contributing cause of the injury.

2. Negligence 🔑136(31)

Whether violation of city ordinance constituted such contributing cause of injury sustained by offender as will preclude recovery for injury is ordinarily a question of fact and becomes a question of law only when it appears that but one inference can reasonably be drawn from the evidence.

3. Automobiles ⚷**245(90)**

Whether violation of city ordinance by riding on handlebars of bicycle contributed proximately to injury sustained by rider when rapidly approaching truck struck bicycle on right rear side as it was proceeding across street in pedestrian crosswalk at intersection so as to preclude recovery against owner and driver of truck for such injury was a question for jury and its implied finding in favor of bicycle rider was not unreasonable.

4. Automobiles ⚷**245(74, 90)**

Where intersection at which bicycle on which minor plaintiff was riding was struck by defendants' truck was well lighted and truck struck bicycle from the side whether plaintiff was contributorily negligent in riding on bicycle knowing that it was not equipped with lights in violation of statute was a question for jury which could reasonably conclude that lack of lights on bicycle did not constitute a proximate cause of accident. Vehicle Code, § 622.

5. Appeal and Error ⚷**1170(6)**

Erroneous comment by trial court on instruction correctly stating the law forbidding comparison of negligence that jury could compare negligence in order to determine proximate cause of accident did not result in a miscarriage of justice, in view of other instructions on proximate cause and contributory negligence. Const. art. 6, § 4½.

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C. F. Jorz, Los Angeles, for appellants.

Paul W. Westerlund, George E. Atkinson, Jr., and John A. Pares, Long Beach, for respondent.

GIBSON, Chief Justice.

A bicycle upon which plaintiff was riding with another boy was struck by a truck owned by defendant corporation and driven by defendant Eichman. A jury awarded plaintiff damages for the injuries which he received, and defendants have appealed from the judgment rendered against them.

On the day of the accident plaintiff, who was 14 years old, and his friend, Louis, 15, were together at the intersection of Broadway and Junipero in the city of Long Beach. The two boys spent some time in a drugstore on the northeast corner of the intersection and then left there intending to cross Broadway to another shop which was located on the southeast corner. Louis, who had his bicycle with him, got on its seat in order to ride it across the street, and plaintiff sat on the handlebars, facing frontwards, with his feet hanging down. It was 7:40 p. m. on a September evening, the weather was clear and dry, the street lights were on, and the intersection was well illuminated. Louis waited for a westbound car to pass, pedalled the bicycle into the pedestrian crosswalk, and moved across Broadway at a speed of 3 miles per hour, with plaintiff riding on the handlebars. At a point in the crosswalk about 5 feet south of the center line of Broadway, the bicycle was struck on the right rear side by an eastbound truck driven by defendant Eichman. The truck approached the intersection at a speed of approximately 50 miles per hour, and the driver gave no warning and did not apply his brakes until he was well into the intersection. At the point of collision the truck was travelling about 30 miles per hour. Plaintiff did not see the truck at any time before it struck the bicycle. Louis was injured and plaintiff suffered a broken right arm and numerous abrasions along his right side, hip and leg.

[1,2] There is ample evidence to support the implied finding that the driver of the truck was negligent, but defendants contend that the record shows, as a matter of law, that plaintiff was guilty of contributory negligence. At the time of the accident a city ordinance forbade persons from riding a bicycle other than on its regular seat or seats, and defendants argue that plaintiff's act of riding the handlebars in violation of the ordinance constituted negligence per se and bars recovery. Even if it be assumed, however, that plaintiff's violation of the ordinance was not excusable or justifiable and constituted negligence per se, it does not follow that his right to recover is barred. It must appear, in addition, that violation of the ordinance was a proximately contributing cause of the injury. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581,

590, 177 P.2d 279. Whether the violation constitutes such contributing cause is ordinarily a question of fact and becomes a question of law only when it appears that but one inference can reasonably be drawn from the evidence. Satterlee v. Orange Glenn School Dist., supra, 29 Cal.2d 581, 590, 177 P.2d 279.

Defendants argue that plaintiff would not have been struck if he had not been riding on the handlebars, hence that his violation of the ordinance was necessarily a proximate cause of his injuries. In effect, we are asked to hold as a matter of law that plaintiff would have been in the area of danger in the crosswalk if he had been crossing the street on foot with Louis instead of riding the handlebars, but it is obvious that the record does not compel such a conclusion.

[3] Plaintiff had a right to be in the crosswalk at the time and place where the collision occurred, and while it is true that he should not have been on the handlebars, the jury could reasonably find that this fact was not a proximate cause of his injury but was merely an accompanying circumstance. Cf. Sharick v. Galloway, 19 Cal.App.2d 693, 695, 696, 66 P.2d 185. As we have seen, the truck driver approached the intersection at a high rate of speed and did not apply his brakes until he was so close to the boys that he was unable to avoid striking them. No warning was given, and plaintiff was not aware of the danger. The question whether plaintiff's conduct contributed proximately to the accident was properly submitted to the jury, and we cannot say that its implied finding in his favor is unreasonable. Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 133, 21 P.2d 553, and Leek v. Western Union Tel. Co., 20 Cal.App.2d 374, 376, 66 P.2d 1232, relied on by defendants, are distinguishable. In each of those cases the plaintiff's negligence consisted of violating an ordinance which forbade him from being at the location where he was struck, and the circumstances were such that it could clearly be said that the accident would not have occurred had he obeyed the law.

[4] Defendants also argue that plaintiff was guilty of contributory negligence because the bicycle was not equipped with lights, in violation of section 622 of the Vehicle Code, and plaintiff rode on it knowing that it had no lights. As we have already seen, however, the intersection was well lighted at the time of the accident, and the truck struck the bicycle from the side. Accordingly, the jury was entitled to conclude, as it did, that the lack of lights on the bicycle did not constitute a proximate cause of the accident. Cf. Flynn v. Kumamoto, 22 Cal.App.2d 607, 608–609, 72 P.2d 248.

[5] Defendants next contend that the court, in commenting on an instruction, erroneously told the jury that it might compare the negligence of the parties in order to determine the proximate cause of the accident. The court gave the following instruction: "The law forbids you to attempt to classify negligence into degrees, or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of reproof or excuse. If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence, with a view to delivering a verdict in favor of, or to favor in any way, the one whose conduct was less reprehensible. If you should find that any party to this action was, or all were, negligent, you will follow the Court's instructions in determining whether or not liability should attach, and do so without regard to how you might grade or compare the negligence involved, if permitted so to do." See Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 294, 153 P.2d 705. In commenting orally on the above instruction, the court told the jury "you cannot compare negligence for the purpose of ascertaining who was more reprehensible [but] you are entitled to compare the negligence in order to determine what negligence, if any, was a proximate cause of the accident." The language used by the court in its comments was unfortunate, but since the law was clearly and correctly stated in the instruction and the jury was accurately

instructed elsewhere on the subject of proximate cause and contributory negligence, we are satisfied that no miscarriage of justice resulted. Cal.Const., art. VI, § 4½.

The other claims of error made by defendants are wholly without merit and need not be discussed.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

39 Cal.2d 826

KEIDATZ et al. v. ALBANY et al.

L. A. 22418.

Supreme Court of California, in Bank.

Oct. 31, 1952.

Action to recover damages for fraud in connection with purchase of home by plaintiffs from defendants. The Superior Court, Ventura County, Walter J. Fourt, J., granted defendant's motion for summary judgment, and plaintiffs appealed. The Supreme Court, Traynor, J., held that judgment sustaining demurrer to plaintiff's action for rescission on ground that action was barred by laches and for failure to rescind promptly did not bar present action for damages for fraud, when present action was based on added allegation, absent from former complaint, that property was worth less than the price agreed upon.

Judgment reversed.

Prior opinion 243 P.2d 552.

1. Judgment ⚷572(2)

Judgment entered after general demurrer has been sustained with leave to amend is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute cause of action, and is consequently a bar to a subsequent action alleging the same facts, and even though different facts may be alleged in second action, if demurrer was sustained in first action on ground equally applicable to second, the former judgment is also a bar.

2. Judgment ⚷572(2)

A judgment entered after sustaining of general demurrer with leave to amend is not a bar to a subsequent action in which new or additional facts are alleged which cure defects in original pleading which stated no cause of action, and such rule pertains without regard to whether plaintiff had opportunity to amend his complaint.

3. Judgment ⚷572(2)

Where demurrer to plaintiff's first action for rescission of contract for purchase of newly constructed home was sustained on ground that alleged defects in construction relied on had become apparent over a year before action, and consequently same was barred by laches and failure to rescind promptly, judgment sustaining demurrer was not a bar to subsequent action alleging new fact that property was worth less than price agreed upon and seeking damages, since ground of former demurrer was not equally applicable to second action. Civ.Code, §§ 1691, 3343.

4. Constitutional Law ⚷70(1)

If rule that judgment sustaining demurrer is one on the merits only to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will accordingly be a bar only to subsequent action alleging the same facts or facts to which same ground of demurrer is applicable, is to be changed, such change is one for legislature, and not the courts. Civ.Code, §§ 1691, 3343.

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D. Wendell Reid, Van Nuys, for appellants.

William T. Selby, Ventura, for respondents.

TRAYNOR, Justice.

In this action to recover damages for fraud, plaintiffs alleged that they were induced to buy a newly-constructed home from defendants by certain false and fraudulent representations respecting the character of the construction of the house and its location on the described real property. They further alleged that the representations were known by defendants to be false and were made to induce plaintiffs to purchase the property and that the contract price of $6,500 exceeded the value of the property by $3,000. In their answer defendants denied the allegations of fraud and pleaded affirmatively that plaintiffs' action was barred by two former adjudications between the parties. Defendants then made a motion for summary judgment supported by affidavits setting out the following undisputed facts: In 1949, plaintiffs brought an action to rescind the contract for fraud and failure of consideration. A demurrer to the second amended complaint was sustained with leave to amend. Plaintiffs failed to amend within the time allowed, and judgment was entered for defendants for costs. Thereafter plaintiffs unsuccessfully sought relief from the judgment under section 473 of the Code of Civil Procedure. No appeal was taken, however, from the judgment or from the order denying relief under section 473. Approximately four months after the judgment in the rescission action was entered, plaintiff brought this action for damages for fraud. The trial court granted defendants' motion for summary judgment and plaintiffs have appealed.

[1, 2] Plaintiffs contend that their unsuccessful attempt to secure rescission of the contract does not bar their present action for damages for fraud. Defendants, on the other hand, contend that the former judgment is res judicata of all issues presented here.[1] Since the former judgment was entered after a general demurrer had been sustained with leave to amend, it is necessary to determine the scope of the doctrine of res judicata in such circumstances. The procedural effect of such a judgment appears to be sui generis. It is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will, accordingly, be a bar to a subsequent action alleging the same facts. See v. Joughin, 18 Cal.2d 603, 606–609, 116 P.2d 777; Goddard v. Security Title Ins. & Guar. Co., 14 Cal.2d 47, 52, 92 P.2d 804; Fay v. Crags Land Co., 62 Cal.App.2d 445, 448, 145 P.2d 46. Moreover, even though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will also be a bar. Robinson v. Howard, 5 Cal. 428, 429; Goddard v. Security Title Ins. & Guar. Co., supra. If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint. Goddard v. Security Title Ins. & Guar. Co., supra; Newhall v. Hatch, 134 Cal. 269, 272, 66 P. 266, 55 L.R.A. 673; Heilig v. Parlin, 134 Cal. 99, 101–102, 66 P. 186; Morrell v. Morgan, 65 Cal. 575, 576–577, 4 P. 580; City of Los Angeles v. Mellus, 59 Cal. 444, 453; Rose v. Ames, 68 Cal.App.2d 444, 448, 156 P.2d 953; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 71, 268 P. 1073; Takekawa v. Hole, 17 Cal.App. 653, 656, 121 P. 296; see, See v. Joughin, 18 Cal.2d 603, 606, 116 P.2d 777; Campenella v. Campenella, 204 Cal. 515, 521, 269 P. 433; Erganian v. Brightman, 13 Cal.App.2d 696, 700, 57 P.2d 971; Restatement, Judgments, § 50, Comments c and e; 30 Calif.L.Rev. 487; Anno., 106 A.L.R. 437, 444.

[3] In plaintiffs' first action they sought rescission of the contract. In addition to alleging certain fraudulent representations whereby they were induced to enter into the contract, they alleged that they had offered to restore everything of value they had received, and sought the return of the payments they had made. It appeared from the complaint, however, that the alleged defects in construction became apparent to plaintiffs over a year before they sought

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[1] After plaintiffs' unsuccessful attempt to rescind the contract, but before the present action was commenced, defendants purchased the property at a foreclosure sale under the deed of trust given to secure the purchase price, and recovered judgment by default for possession of the property. Defendants make no argument on this appeal, however, that the summary judgment may be sustained on the basis of these facts.

to rescind, and defendants successfully demurred on the ground that the action was barred by laches and by failure to rescind promptly. See, Civ.Code § 1691; Williams v. Marshall, 37 Cal.2d 445, 455–456, 235 P.2d 372. Whether or not the complaint stated a cause of action for rescission, the demurrer should have been overruled if a cause of action for damages was stated. Bancroft v. Woodward, 183 Cal. 99, 102, 190 P. 445; MacIsaac v. Pozzo, 26 Cal.2d 809, 815, 161 P.2d 449. Plaintiffs' complaint did not, however, allege that the property was worth less than the price they agreed to pay for it, Civ.Code § 3343, and accordingly, it did not state a cause of action for damages for fraud. Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 679, 67 P.2d 1039; Gutterman v. Gally, 131 Cal. App. 647, 651–652, 21 P.2d 1000. In the present action, plaintiffs have added this allegation that was absent from their former complaint, and accordingly, under the rule hereinabove stated, the former judgment is not a bar to this action.

[4] Defendants contend, however, that Wulfjen v. Dolton, 24 Cal.2d 891, 151 P.2d 846, establishes the rule that a party claiming to have been defrauded must seek all the relief to which he may be entitled in one action, and that he may not, after having failed in an action to rescind a contract for fraud, thereafter bring a second action for damages. In the Wulfjen case, however, the judgment in the rescission action had not been entered on demurrer, but had followed a full trial on the merits, and the court applied the rule that such a judgment is res judicata not only as to issues actually raised, but as to issues that could have been raised in support of the action. See, Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497. As has been pointed out above, however, it has been the settled rule in this state that a judgment entered on demurrer does not have such broad res judicata effect. The rule respecting such judgments is illustrative of the line that has been drawn beyond which a plaintiff may not go if he hopes thereafter to start again. It is analogous to the rule that was applicable to nonsuits before section 581c was added to the Code of Civil Procedure in 1947. A judgment of nonsuit was not on the merits, and a plaintiff could start anew and recover judgment if he could prove sufficient facts in the second action. Herdan v. Hanson, 182 Cal. 538, 542, 189 P. 440; In re Estate of Sharon, 179 Cal. 447, 461, 177 P. 283; City and County of San Francisco v. Brown, 153 Cal. 644, 648, 96 P. 281. Section 581c now provides that a judgment of nonsuit operates as an adjudication upon the merits unless the court otherwise specifies. In view of the liberal rules relating to amendments to the pleadings, it has been forcefully advocated that the same policy reflected in section 581c should apply to judgments on demurrer, and that a plaintiff should be required to set forth all the facts relating to his dispute in one action. See, McFarland, J., dissenting in Newhall v. Hatch, 134 Cal. 269, 276, 66 P. 266, 55 L.R.A. 673; Von Moschzisker, Res Judicata, 38 Yale L.J. 299, 319–320; Clark on Code Pleading (2nd ed.) § 84, p. 531; 30 Calif.L.Rev. 487, 490–491. On the other hand less prejudice is suffered by a defendant who has had only to attack the pleadings, than by one who has been forced to go to trial until a nonsuit is granted, and the hardship suffered by being forced to defend against a new action, instead of against an amended complaint, is not materially greater. See, Commercial Centre Realty Co. v. Superior Court, 7 Cal.2d 121, 129–130, 59 P.2d 978, 107 A.L.R. 714. We do not feel, however, that at this time we should reweigh the conflicting arguments over the wisdom of the rule we apply. Since it is a settled rule of procedure upon which parties are entitled to rely in conducting their litigation, any change therein should be made by the Legislature and not by this court.

Since the judgment must be reversed, it is unnecessary to decide whether it was proper in this case for defendants to proceed by motion for summary judgment under section 437c of the Code of Civil Procedure rather than under the provisions of section 597 of that code.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

39 Cal.2d 888

Herbert BISNO, petitioner, v. J. Paul LEONARD, as President of San Francisco State College, et al., respondents.

S. F. 18348.

Supreme Court of California, in Bank.
Oct. 17, 1952.

Rehearing Denied Nov. 14, 1952.

Application for Writ of Mandate.

Wayne M. Collins, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., H. H. Linney, Chief Asst. Atty. Gen., and Herbert E. Wenig, Deputy Atty. Gen., for respondents.

PER CURIAM.

This original proceeding in mandamus was brought by an assistant professor at San Francisco State College who did not have teacher's tenure but held his position by appointment from year to year. The issues raised are identical with those in Pockman v. Leonard, Cal.Sup., 249 P.2d 267, and on the authority of that case petitioner is entitled to payment of compensation for services rendered up to and including thirty days following October 3, 1950, the effective date of sections 3100–3109 of the Government Code, Stats.1951, 3rd Ex.Sess.1950, ch. 7, p. 15, but, having failed to take the required oath, he is not entitled to compensation for any subsequent period.

Insofar as petitioner seeks payment of salary or other relief for any period subsequent to thirty days after October 3, 1950, the application is denied. Let a writ of mandate issue for the limited purpose of directing payment of petitioner's salary up to and including thirty days after October 3, 1950.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in Pockman v. Leonard, Cal.Sup., 249 P.2d 267, I would issue a writ of mandate as prayed for in the petition.

Rehearing denied; Carter, J., dissenting.

39 Cal.2d 676

POCKMAN v. LEONARD et al.

S. F. 18349.

Supreme Court of California, in Bank.
Oct. 17, 1952.

Rehearing Denied Nov. 14, 1952.

Original proceeding in mandamus brought by an associate professor at a state college to compel respondents to certify his name on public payroll and to pay him salary which was withheld because of his failure to execute oath of allegiance required by statute to be taken by civil defense workers. The Supreme Court, Gibson, J., held that oath prescribed by statute requiring civil defense workers to take and subscribe to loyalty oath is not type of oath prohibited by constitutional provision prescribing oath to be taken by members of legislature and officers and providing that no other oath shall be required as qualification for office or public trust.

Order in accordance with opinion.

Carter, J., dissented.

1. Constitutional Law 🔑62
Officers 🔑110

Statute which declares public employees to be civil defense workers, subject to such civilian defense activities as may be assigned to them by their superiors or by law, does not invalidly delegate legislative power to define and impose civil defense duties. Government Code, § 3100–3109.

2. Officers 🔑36(1)

Under constitutional provision prescribing oath to be taken by members of legislature, and providing that no other oath, declaration, or test shall be required as a qualification for any office or public trust, any oath or declaration which imposes a religious or political test is prohibited. Const. art. 20, § 3.

3. Officers 🔑25

Constitutional provision prescribing oath to be taken by members of legislature and officers and providing that no other oath, declaration, or test shall be required as qualification for any office or public trust, does not prevent examination of public employees for skill, education or other qualities reasonably related to qualifications for public service. Const. art. 20, § 3.

4. Colleges and Universities 🔑8
Officers 🔑36(1)

Prohibition contained in constitutional provisions prescribing oath to be taken by members of legislature and other public officers and providing that no other oath, declaration, or test shall be required as qualification for any office or public trust, applies to every state and local officer and employee, and was applicable to teacher in state college. Const. art. 20, § 3.

5. Officers 🔑36(1)

Under statutory requirement that civil defense worker take and subscribe to oath that he does not advocate or belong to organization that advocates overthrow of government by unlawful means, that within five years immediately preceding taking of oath he has not been a member of any such organizations except those he lists on face of oath, and that while employed by designated agency he will not advocate or become a member of organization that advocates such doctrines, each clause must be interpreted as requiring knowledge of character of any group as to which a declaration is required. Government Code, § 3103.

6. Officers 🔑36(1)

Oath prescribed by statute requiring civil defense worker to swear that he does not advocate or belong to organization that advocates overthrow of government by unlawful means, that within five years immediately preceding taking of oath he has not been a member of any such organizations except those which he lists on face of oath, and that while employed by designated agency he will not advocate or become a member of organization that advocates such doctrines, is not type of oath prohibited by constitutional provision prescribing oath to be taken by members of legislature and officers and providing that no other oath shall be required as qualification for office or public trust. Government Code, § 3103; Const. art. 20, § 3.

7. Officers 🔑64

A governmental body has right to direct that its employees shall not belong to organizations which they know advocate overthrow of government by force or other unlawful means.

8. Officers 🔑25

A person's associates, as well as his conduct, are relevant factors in determining fitness for public office and loyalty to government.

9. Schools and School Districts 🔑45

The state, under its police power may properly limit a person's freedom of choice between membership in organizations which advocate overthrow of government by unlawful means and employment in school system.

10. Officers 🔑36(1), 64, 110

Public servants may properly be required to furnish information regarding past membership in organizations that to their knowledge advocated overthrow of government by force or other unlawful means.

11. Criminal Law 🔑393(1)

Statutory provision requiring civil defense worker to swear that he does not advocate or belong to organization that advocates overthrow of government by unlawful means, that within five years immediately preceding taking of oath he has not been a member of any such organizations except those which he lists on face of oath, and that while employed by designated agency he will not advocate or become a member of organization that advocates such doctrines, is not rendered invalid by fact that divulging past or present membership may, under some circumstances, amount to self incrimination. Government Code, § 3103.

12. Colleges and Universities ⚷8

An associate professor in state college who refused to take oath required by statute requiring civil defense worker to take and subscribe to loyalty oath was entitled under statute to receive salary earned during 30 day period following effective date of Act in view of statutory provision granting such workers 30 days in which to decide whether to take oath. Government Code, § 3103.

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Wayne M. Collins, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., H. H. Linney, Chief Asst. Atty. Gen., and Herbert E. Wenig, Deputy Atty. Gen., for respondents.

GIBSON, Chief Justice.

This is an original proceeding in mandamus brought by an associate professor at San Francisco State College to compel respondents to certify his name on the public payroll and to pay him salary which was withheld because of his failure to execute the oath required by sections 3100–3109 of the Government Code, known commonly as the Levering Act. Stats.1951, 3rd Ex. Sess.1950, ch. 7, p. 15.

The statute declares that all public employees are "civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law", and it defines public employees as all persons employed by the state or any county, city, city and county, state agency or public district, excluding aliens legally employed. Gov.Code, §§ 3100–3101. "Subject to the provisions of Section 3 of Article XX of the Constitution," all civil defense workers are required to take the oath prescribed by section 3103 of the Government Code within the first 30 days of employment. Gov.Code, § 3102. It is further provided that no compensation shall be paid to any civil defense worker by any public agency unless he has subscribed to the oath, and that it shall be the duty of the person certifying to public payrolls to ascertain and certify that the oath has been taken by such workers. Gov.Code, § 3107. Section 3108 declares that it is perjury to make false statements in the oath, and section 3109 makes it a felony for a person, after taking the oath and while in public employment, to advocate or become a member of an organization which advocates overthrow of the government by force or other unlawful means. The remaining sections Gov.Code, §§ 3104–3106, specify the manner of taking and filing the oath and provide that compliance with the act shall be deemed compliance with Government Code sections 18150–18158[1] relating to the taking of oaths by state employees.

The act went into effect October 3, 1950. Petitioner failed to take the required oath within 30 days thereafter, and respondents refused to certify his name to the public payroll or to pay his salary for services rendered during the months of October and November.

[1] The first question is whether the provisions which declare public employees to be civil defense workers, "subject to such civilian defense activities as may be assigned to them by their superiors or by law", render the entire act invalid. Gov. Code, §§ 3100–3101. Petitioner asserts that the statute imposes on public employees a rule of martial law and "herds them into a headless, tailless and nondescript military body." There is nothing in the act, however, which purports to conscript public workers into military service or which declares them to be subject to martial law. Petitioner also claims that the act improperly subjects him to assignment to activities outside and beyond his regular duties. It is clear, however, that a teacher may properly be assigned certain duties relating to civil defense, such as the instruction of pupils regarding their behavior during atomic explosions, air raids or other at-

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[1] Gov. Code, §§ 18150–18158, provide that every person appointed to a state position, whether civil service or non-civil service, shall within 30 days of appointment take a prescribed oath which is the same as that set forth in Const., art. XX, § 3.

tacks. Tasks of this type, like the holding of fire drills, are within the scope of the duties of a teacher and may be properly required of him regardless of the fact that they may also constitute civil defense activities. There is no complaint that any specific civil defense duties have been imposed on petitioner under the act, and we should not assume that any improper assignments will be made. The provision that workers are subject to such activities "as may be assigned to them by their superiors or by law" does not, as asserted, invalidly delegate legislative power to define and impose civil defense duties. Instead, the reasonable construction is that the superiors, in making assignments, are limited to such authority as they already have or may subsequently be granted by law.

We turn now to other arguments made by petitioner. The oath which he has refused to take reads as follows:

> "I, ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.
>
> "And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:
>
> ———————————————
>
> "(If no affiliations, write in the words 'No Exceptions') and that during such time as I am a member or employee of the ——————————— I will
> (name of public agency)
> not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means." Gov.Code, § 3103.

Section 3 of article XX of the state Constitution provides:

> "Members of the Legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:
>
> "'I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of ——————— according to the best of my ability.'
>
> "And no other oath, declaration, or test, shall be required as a qualification for any office or public trust."

When petitioner was appointed to the state college faculty in 1946 he took an oath identical to that prescribed in section 3 of article XX, and he argues that he is exempted by the last sentence of that section from taking any "other oath, declaration, or test" and, hence, cannot be required to take the oath prescribed by section 3103 of the Government Code.

When resort is had to the historical background of the constitutional provision, it appears that the words "oath, declaration, or test" have an important connotation in connection with qualifications for public service. The English "test" act of 1673, which was so odious to the people, required all civil and military officers to take "oaths" of allegiance and supremacy and to make "declarations" regarding matters of opinion, particularly religious beliefs. Stat. 25

Car. II, c. 2; see 4 Blackstone Commentaries 59. This act was undoubtedly in the minds of framers of state Constitutions when they used these words in drafting constitutional provisions similar to ours. People v. Hoffman, 1886, 116 Ill. 587, 5 N.E. 596, 605, 8 N.E. 788; Attorney General v. Board of Councilmen of City of Detroit, 1885, 58 Mich. 213, 24 N.W. 887, 889–890; Rogers v. City of Buffalo, Sup.1888, 3 N.Y.S. 671, 673–674, affirmed 123 N.Y. 173, 25 N.E. 274, 278–279, 9 L.R.A. 579.

[2, 3] The prohibition contained in section 3[2] was considered in the early case of Cohen v. Wright, 22 Cal. 293, where it was said at page 310, "In our judgment it was not intended to limit the action of the Legislature to the particular set form of words used in the Constitution, and it is clearly within their power to prescribe any form, so that they do not go beyond the intent, object and meaning of the Constitution." And in Bradley v. Clark, 133 Cal. 196, 201, 65 P. 395, 396, it was stated that the language in section 3 "leaves, as the only matter for determination, the single question whether [the statute there involved] does impose an oath or test substantially different from that prescribed by the constitution." In this connection, it would seem clear that any oath or declaration which imposes a religious or political test is prohibited. See Bradley v. Clark, 133 Cal. 196, 201, 65 P. 395; Rogers v. City of Buffalo, supra, 3 N.Y.S. at pages 673–674; Attorney General v. Board of Councilmen of City of Detroit, supra, 24 N.W. at page 890, concurring opinion; cf. United Public Workers v. Mitchell, 330 U.S. 75, 100, 67 S.Ct. 556, 91 L.Ed. 754. It has been recognized, however, that such a constitutional prohibition does not prevent the examination of public employees for skill, education, or other qualities reasonably related to qualifications for public service. As said in Rogers v. City of Buffalo, 123 N.Y. 173, 25 N.E. 274, 278, 9 L.R.A. 579, in answer to a contention that "Nothing but the bare oath" mentioned in the Constitution could be required, "We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people through their legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office." See also Attorney General v. Board of Councilmen of City of Detroit, 58 Mich. 213, 24 N.W. 887, 889–890.

Before proceeding to determine whether the oath set forth in section 3103 of the Government Code is substantially the same as the constitutional oath, we shall consider respondents' contention that petitioner is not entitled to the benefit of the constitutional prohibition because, it is asserted, he is not the holder of an "office or public trust" within the meaning of that provision. The terms "office" and "public trust" have been said to be nearly synonymous, Ex parte Yale, 24 Cal. 241, 243, but the particular positions to which they apply have not been clearly defined. Different results have been reached in classifying public positions involving similar duties and responsibilities, and the meaning and extent of the term "office" tends to vary with the purpose of the statute in which it appears. See, for example, Patton v. Board of Health, 127 Cal. 388, 393–397, 59 P. 702; People ex rel. Attorney General v. Wheeler, 136 Cal. 652, 654–655, 69 P. 435; Wall v. Board of Directors of Deaf, Dumb and Blind Asylum, 145 Cal. 468, 471–472, 473, 78 P. 951; Coulter v. Pool, 187 Cal. 181, 185–187, 201 P. 120; Spreckels v. Graham, 194 Cal. 516, 525–532, 228 P. 1040; Brooks v. City of Gilroy, 219 Cal. 766, 770–772, 29 P.2d 212; People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636, 639–640, 107 P.2d 388; Sims, "What is a Public Office in California," 8 So.Cal. L.Rev. 11 [1934]. Accordingly, the cases which have dealt with the term in construing statutes unrelated to the subject involved here are not particulary helpful, and we must look to the purposes of section 3 in order to ascertain the intention of its framers.

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[2] **At the time of the Cohen case the provision appeared in § 3, art. XI, Const. of 1849.**

[4] There is no merit in respondents' suggestion that the only persons entitled to the benefit of the prohibition are members of the Legislature, judges and the seven executive officers mentioned in article V of the Constitution.[3] The provision of section 3 requiring the oath to be taken by all officers, except "inferior officers" exempted by the Legislature, shows that the requirement is not limited to the persons named in article V and that it at least includes all inferior officers who are not exempted. It would do violence to the plain meaning of the words used if the section were read as providing that the Legislature might exempt "inferior officers" from taking the prescribed oath and at the same time compel them to take some other kind of "oath, declaration, or test". We are unable to find any place where a line can reasonably be drawn so as to place some positions within and others outside the constitutional prohibition, and, in our opinion, there is no justification for excluding any public servants from its protection. The prohibition should therefore be read as applying to every state and local officer and employee. This construction is in accord with the basic purpose of safeguarding the public and its servants by forbidding oaths and declarations regarding matters that bear no reasonable relationship to governmental service and particularly those that involve political and religious beliefs. Persons in the lower levels of government are just as much entitled to this protection as those in higher positions. Any other interpretation of the prohibition would lead to the absurd result that the relatively few persons who occupy the most important positions could be required to take only the constitutional oath, while those who work under them and execute their orders could be compelled to submit to various other oaths, declarations and tests.

We come now to the question whether there is any substantial difference between the oaths prescribed by the state Constitution and by section 3103 of the Government Code. The constitutional oath consists of a declaration or pledge of loyalty to the state and federal Constitutions, and a promise or pledge of faithful performance of duty. The first paragraph of the oath required by section 3103 contains substantially the same pledge of loyalty and faithful performance of duty as that found in the constitutional oath, with only immaterial differences in language. In the second paragraph the affiant swears to three matters, namely, (1) that he does not advocate or belong to any organization that advocates overthrow of the government by force or violence or other unlawful means; (2) that within the five years immediately preceding the taking of the oath he has not been a member of any such organizations except those which he lists in the space provided on the face of the oath; and (3) that while employed by the designated agency he will not advocate or become a member of any organization that advocates such doctrines.

[5] It should be noted at the outset that the oath provisions relating to membership can reasonably be construed as referring only to affiliation with organizations *known* by the employee to belong to the proscribed class, and each clause of the oath must be interpreted as requiring knowledge of the character of any group as to which a declaration is required. See Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 723–724, 71 S.Ct. 909, 95 L.Ed. 1317.

The first and third parts of the second paragraph are essentially a declaration of present and future loyalty to the government of this state and of the United States. A person obviously cannot be loyal to a government and at the same time advocate its violent and unlawful overthrow. By the same token, voluntary unexplained membership in an organization known by a public employee to advocate such doctrines indicates that he has interests which are inconsistent with his pledge of loyalty and faithful performance of duty, and the Legislature, by requiring this oath, has in effect found that such membership is incompatible with loyalty.[4] In the recent case of Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 386, the United States Supreme Court sustained as reasonable an implied legislative finding that "the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means."

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[3] Those officers are: governor, lieutenant governor, secretary of state, controller, treasurer, attorney general and surveyor general. Pursuant to Const., art. V, § 19, the office of surveyor general was abolished by Pol.Code, § 690, in 1929.

The middle part of the second paragraph of the oath calls for disclosure of information relating to past loyalty. In it the affiant is required to list any organizations, to which he has belonged in the five years preceding taking of the oath, that advocated overthrow of the government by force or violence or other unlawful means. Information as to past affiliations may be relevant in determining whether an employee can be placed in a position of present or future public responsibility. See Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 720, 71 S.Ct. 909, 95 L.Ed. 1317; Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 385. Nothing in section 3 of article XX is intended to prevent the state from requiring disclosure of facts relating to an employee's fitness and suitability for public service, and inasmuch as this portion of the oath, in effect, calls for a statement of past loyalty which is relevant to present and future loyalty, it is in no way inconsistent with the spirit or intent of the constitutional oath.

The oath required by section 3103 is obviously not a test of religious opinion. Neither does it compel disavowal of any political belief or membership in any named political party. While it requires the affiant to swear that he does not advocate, or belong to any party or organization which advocates overthrow of the government by force or violence or other unlawful means, these may not properly be called matters of political opinion. The word "political" imports orderly conduct of government, not revolution, and the term is not applicable to advocacy of a belief in overthrow of the government by force or violence. See Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 485, 171 P.2d 21, 166 A.L.R. 701.

[6] We are satisfied that there is nothing in the Levering oath which goes beyond the object or meaning of section 3 of article XX and that it is not the type of "other oath, declaration, or test" which was intended to be prohibited by that section.

[7–9] Nearly all of the contentions made by petitioner concerning asserted violations of federal constitutional guarantees are answered adversely to him by recent decisions of the United States Supreme Court. It has been held that a governmental body has the right to direct that its employees shall not belong to organizations which they know advocate overthrow of the government by force or other unlawful means, and that they may be required to make sworn statements similar to the oath prescribed by section 3103 as a condition to obtaining or continuing in public employment. Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380; Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; cf. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925. A person's associates, as well as his conduct, are relevant factors in determining fitness and loyalty, and the state, under its police power, may properly limit a person's freedom of choice between membership in such organizations and employment in the school system. Adler v.

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[4] Since 1947 Gov. Code, § 1028 has provided: "It shall be sufficient cause for the dismissal of any public employees including teachers in the public schools or any state supported educational institution when such public employee or teacher advocates or is a member of an organization which advocates overthrow of the Government of the United States or of the State, by force, violence, or other unlawful means."

Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 385.

[10, 11] Past conduct and loyalty have a reasonable relationship to present fitness and trustworthiness, and public servants may properly be required to furnish information regarding past membership in organizations that to their knowledge advocated the overthrow of government by force or other unlawful means. See Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 719–720, 71 S.Ct. 909, 95 L.Ed. 1317. The fact that divulging past or present membership may, under some circumstances, amount to self-incrimination does not render the act invalid since the disclosure of the required information is a reasonable condition or qualification of employment. See Christal v. Police Commission, 33 Cal.App.2d 564, 92 P.2d 416; 64 Harv.L.Rev., 987–996; 28 Cal.L.Rev., 94–95; cf. United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754.

[12] Petitioner is a permanent employee of the college, with teacher's tenure, and he claims that the act has been applied so as to impair contractual obligations. Even if we assume that petitioner has a contract right to his position, there can be no question that an implied condition of the agreement is that he will be loyal to the government and that he will not advocate its overthrow by force. Under its police power the state may, as a means of implementing the implied condition, require its employees to make a declaration of loyalty and furnish relevant information. "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435, 54 S.Ct. 231, 239, 78 L.Ed. 413; cf. East New York Savings Bank v. Hahn, 326 U.S. 230, 232, 66 S.Ct. 69, 90 L.Ed. 34; Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525, 531–532, 69 S.Ct. 251, 93 L.Ed. 212; Veix v. Sixth Ward Building & Loan Ass'n, 310 U.S. 32, 38, 60 S.Ct. 792, 84 L.Ed. 1061. It appears, however, that respondents applied the act improperly in withholding payment for services rendered by petitioner prior to the date on which he was required by law to take the oath. Stats. 1951, 3rd Ex.Sess. 1950, ch. 7, § 2, pp. 15, 17. Employees were given a thirty-day period of grace after the effective date of the act within which to decide whether or not they would take the oath, and it would be unreasonable to hold that the Legislature intended to require a forfeiture of the salary earned during this period in the event that an employee chose to leave his position rather than comply with the condition.

It follows that petitioner is entitled to compensation for services rendered up to and including thirty days following October 3, 1950, the effective date of the statute, but, having failed to take the oath, he is not entitled to compensation for any subsequent period.

Insofar as petitioner seeks payment of salary or other relief for any period subsequent to thirty days after October 3, 1950, the application is denied. Let a writ of mandate issue for the limited purpose of directing payment of petitioner's salary up to and including thirty days after October 3, 1950.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The only word of commendation which I can speak for the opinions of the court in these cases is that they bring into sharp focus the loyalty oath hysteria which has pervaded this country and particularly this state during the past five or six years. The concept that a person exposed to subversive activity may be immunized against such exposure by the taking of a so-called loyalty oath opens the door for vast exploration in the field of metaphysical research. While this process is taking place the loyalty of every public employee is impugned even though he has taken the oath prescribed by the Constitution many times and has obeyed it religiously. It must be conceded, however, that those who have been loyal may become disloyal and that "eternal vigilance is the price of liberty," but it should not follow that vigilance against disloyalty of public employees requires that they take an oath proscribed by the Constitution. The holding of the majority in these cases requires the taking of such an oath.

From the records before us in the various cases decided by the opinions this day filed, it would appear that many days, weeks and possibly months were consumed by the state Legislature, the Board of Regents of the University of California and the various boards of supervisors and city councils of the counties and cities of California in the preparation, discussion and adoption of various loyalty oath proposals. In addition to the time consumed in the legislative field, these cases have been before the various courts of this state during the past two or three years where thousands of pages of transcripts and briefs have been prepared and filed and the time and effort of numerous judges and lawyers has been consumed in their disposition. In my opinion all of this time and effort, as well as the money necessarily expended in connection with the legislation and judicial proceedings, which must have amounted to thousands, if not millions of dollars, was, and is entirely wasted, and has been and will be of no benefit whatsoever either to the general public or the individuals affected thereby. There can be no escape from this conclusion when we consider that the Constitution of this state expressly and specifically declares the form of oath required of all persons holding any public position under the law of this state, and expressly provides that: "no other oath, declaration, or test, shall be required as a qualification for any office or public trust." Cal.Const., art. XX, sec. 3. The oath prescribed by the Constitution is a simple, concise declaration, solemnly made by the person taking it, that he will support the Constitution of the United States and the Constitution of the State of California and faithfully discharge the duties of the office or employment which he is undertaking to the best of his ability. The constitutional provision, by implication at least, confers upon the Legislature the power to require that this oath be taken by all who occupy any office or public trust under the law of this state and the Legislature saw fit to require that all state employees take such oath. See Gov.Code, § 18150 et seq. It is a conceded fact in each of these cases that every employee of the state here involved took the constitutional oath long before the enactment of the acts which constitute the basis of this litigation. Notwithstanding this undisputed fact, the majority of this court holds in each of these cases that these petitioners are required to take another oath prescribed by the so-called Levering Act, Stats. 1951, 3rd Extra Session 1950, ch. 7, p. 15, which, it is said, is no different than the oath prescribed by the Constitution. The majority nevertheless holds that because each of the petitioners has failed to take the oath prescribed by the Levering Act, they have forfeited their position with the state in accordance with the provisions of that act. This is indeed strange and paradoxical reasoning. In effect the majority says: No employee of the state is required to take any other oath than that prescribed by the Constitution, but even though all employees of the state have taken the constitutional oath, they must also take the Levering Act oath which is the same as that prescribed by the Constitution, and if they do not take the Levering Act oath, they are ineligible for employment by the state. If there is any logic or common sense in such reasoning, it is not apparent to me and I have grave doubt that it will appeal to any thinking person.

I have no doubt as to the good intentions of the various legislative bodies which adopted these loyalty oath proposals, and I do not consider it the function of the judicial branch of the government to pass upon the wisdom of such proposals. The sole and only question before the courts is whether the enactments contravene some provision of the fundamental law—the Constitution. This is true even though a very grave question of public policy may be involved. It is for the Legislature and not the courts to declare the public policy of the state, providing such declaration is not in conflict with the Constitution.

We are therefore met at the outset of this discussion with the problem of what was intended by the framers of the Constitution when they wrote into Article XX, section 3, the words: "And no other oath, declaration, or test, shall be required as a qualification for any office or public trust."

The section as it now appears in the Constitution of 1879 is precisely the same, word for word, as it was in the Constitution of 1849. There it was Article XI, section 3. Browne, The Debates in the Convention of California on the Formation of the State Constitution, Wash. 1850, App. X. Though there was debate on changing the language in the 1878 Convention, *no change was made.*

It seems clear that what the delegates to the original convention in Monterey in 1849 had in mind is the mandate of Article VI, clause 3 of the Federal Constitution and the experience leading up to the adoption of that clause. The debate in the 1849 Convention was singularly short. The committee which brought in the clause proposed the following, Browne, Debates, p. 255: "Members of the Legislature, and all officers before they enter upon the duties of their offices, shall take the following oath or affirmation: I (A B) do solemnly swear (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent on me as ...., according to the best of my abilities and understanding, agreeably to the Constitution and Laws of the United States, and of this State; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it, with a citizen of this State, nor have I sent or accepted a challenge to fight a duel with deadly weapons, with a citizen of this State, nor have I acted as second in carrying a challenge, or aided, or advised, or assisted any person thus offending. So help me God."

Thus it will be seen that the committee proposed that all members of the Legislature and "all officers" take an oath in two parts, one as to the Constitution of the State and of the United States and the other as to not having participated in a duel. The convention had just adopted Article XI, section 2, providing that any one who after the adoption of the Constitution participated in a duel shall be deprived of, *inter alia*, holding any office of profit under the Constitution. Browne, Debates, p. 255.

Mr. Halleck thereupon proposed a substitute in the language of the present Article XX, section 3, because "this substitute was the most simple he could find *on the subject* in any of the Constitutions." (Emphasis added.) Browne, Debates, p. 256. Mr. McDougal opposed the substitute on the ground that the section as proposed by the committee was necessary to carry out the object of the preceding section. A vote was taken on the substitute: it was adopted, and became a part of the proposed Constitution.

A comparison of the language of Article XI, section 3, now Article XX, section 3, shows a striking similarity to the language of Article VI, clause 3, of the Federal Constitution. A look at the Federal Constitutional debates should therefore prove helpful.

The idea that the legislative, executive and judicial officers, within the several states, ought to be bound by oath to support the Articles of the Union was proposed by Mr. Randolph, 5 Elliott, Debates on the Federal Constitution 128, Messrs. Sherman, Gerry and Luther Martin felt the requirement intruded improperly on the states, but Mr. Randolph's idea prevailed, 5 Elliott 183, 351, 352. During the debate Mr. Wilson said "he was never fond of oaths, considering them as left handed security only. A good government did not need them, and a bad one could not or ought not to be supported." 5 Elliott 352.

The idea that "no religious test or qualification shall ever be annexed to any oath of office under the authority of the United States" was first proposed to the convention by Mr. Pinckney, 5 Elliott, 446, 498, Mr. Sherman thought it unnecessary, "the prevailing liberality, being a sufficient security against such tests." 5 Elliott, 498.

But the convention was cautious and adopted Mr. Pinckney's views, 5 Elliott, 598, just as the whole country was cautious in insisting on the first ten amendments, now known as "The Bill of Rights."

The two ideas were combined and emerged as Article VI, clause 3, 5 Elliott, 564. Thus, it appears, if anything, that the California delegates, though taking a leaf from the Federal Constitution, went further and proscribed not only religious test oaths, as had the Federal delegates, but *any* test oath.

Nor did the debates in the 1878 convention change the picture. Four amendments to the 1849 language were suggested. All of them were defeated. III Debates and Proceedings of the Constitutional Convention of the State of California [1878], pp. 1390–1391. The first dealt with a requirement of bonds for sheriffs and marshals. The second deleted the word "executive," replaced it with "ministerial" and added oath requirements as to dueling, bribery, and employment of Asiatics. The third was an amendment to the second and deleted the words "members of the legislature," "judicial" and "ministerial,' and added the words "state, county, township, district and municipal, executive, legislation, judicial and ministerial." The fourth struck out the word "test."

Each of these suggestions was defeated, one by one. If anything can be gleaned from this legislative history, it is that the delegates of 1878 determined to leave the provision as it had always been—in simple language meaning what it said: That only *one* oath could be required for those in the public employ and *one* only. The abhorrence for test oaths for the servants of the public which prevailed in Monterey in 1848 and in Philadelphia in 1787 prevailed in Sacramento in 1878. It would prevail today were it not for the hysteria and name calling whch has tended to obscure the traditional concept of the framers of both Constitutions.

It should be noted that the Levering Act oath is strikingly similar in its language and tone to the third and fourth amendments suggested at the Constitutional Convention of 1878. Indeed the first paragraph of the Levering Act is almost identical, word for word, with the first paragraph of the defeated 1878 amendments. And the second paragraph resounds as though in echo to the sentiments which moved the gentlemen in 1878 to propose an oath that one had not employed Asiatics.

But historical coincidence aside, the Levering Act oath and the constitutional oath are as different as day from night both in content and intent. In the first place, the constitutional oath is not a perjury oath. It relates to a state of mind, a promise in good faith to perform one's duties to the best of one's abilities. That an oath of office as relates to the future performance of duties does not relate to perjury was recognized by the Legislature even before the 1879 Constitution was enacted. See Penal Code, § 120. Furthermore, it is clear that the constitutional oath is a promissory declaration intended to solemnize an occasion and to impress upon the mind of the employee the trust upon which he is about to enter. It is not intended to inhibit one's thinking nor one's associations.

The majority holds that "We are satisfied that there is nothing in the Levering oath which goes beyond the object or meaning of section 3 of article XX and that it is not the type of 'other oath, declaration, or test' which was intended to be prohibited by that section." With this statement, I most emphatically disagree. The constitutional oath relates to the future: "I do solemnly swear (or affirm, as the case may be,) that I *will* support the Constitution of the United States and the Constitution of the State of California, and that I *will* faithfully discharge the duties of * * *." There can be no other meaning than *that from the time of taking employment and the oath the affiant will support the constitutions.* The Levering oath, on the other hand, calls for an oath regarding past activities: "that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated * * *." So far as the balance of the Levering Act is concerned, it might possibly be inferred from the constitutional oath that in swearing to support the two constitutions, the affiant impliedly swears to defend them "against all enemies, foreign and domestic" and that he would not become a member of any organization advocating the overthrow of the two governments by force and violence since the two matters just set forth would be, in reality, one and the same thing. But the fact remains that the words so stating are *not* in the constitutional oath except by implication. No such implication may be read into the constitutional oath with respect to that portion of the Levering Act relating to *past* affiliations. The above quoted statement from the majority opinion is deceptive in its simplicity in that it seeks to uphold the Levering Act, since that is the popular thing to do, but must in some manner avoid the clear, positive and unequivocal mandate of the constitution that "no other oath, declaration, or test, shall be required as a qualification for any office or public trust." The only way to avoid that provision is to say that there is no substantial difference between the two oaths. And to say that there is no substantial difference between the two is the height of absurdity. As was said in Sheehy v. Shinn, 103 Cal. 325, 37 P. 393, the Constitution will not be so construed as to permit an evasion of it; and to give effect to that instrument it has been declared to be as much the duty of the court to see *that it is not evaded as that it is not directly violated.* Inasmuch as constitutional provisions are, and have always been, unless expressly provided to the contrary, to be construed as prospective in operation, what can the result reached here be considered but an evasion of the provision declaring that no other oath, declaration or test *shall* be required?

If, as stated by the majority, there is no substantial difference between the two oaths, it would appear that the Levering Act adds nothing to the constitutional oath and is, therefore, a nullity. All these petitioners have taken the constitutional oath and, if the two are the same, there appears to be no sound reason why they should lose their positions and means of earning a livelihood because they have refused to do a useless act. The law does not require useless acts (or so we have always been told), but if we follow the reasoning of the majority to its illogical conclusion, the law does require, on pain of dismissal from employment, the doing of such an act.

An act of government undertaken without constitutional authority and in excess of constitutional limitations is a nullity in law and may properly be disobeyed or resisted. "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60.

It is admitted by the majority that the two early cases of Cohen v. Wright, 22 Cal. 293 and Bradley v. Clark, 133 Cal. 196, 65 P. 395, held that the question involved in litigation of this sort was whether the Legislature had, in prescribing an oath, gone "beyond the intent, object and meaning of the Constitution" and whether the Legislature had prescribed an oath or test substantially different from that prescribed by the Constitution. As I have heretofore pointed out, the Levering Act provision relating to past affiliations *at least* goes far beyond the intent, object and meaning of the Constitution. It cannot then be said, with a clear conscience, that the two oaths are substantially similar inasmuch as the Constitution in this respect speaks only of the present and the future.

It cannot be denied that the two Constitutions are the supreme law of the state and of the United States and, as said by John Marshall, the greatest Chief Justice this country has ever known: "Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice, completely obligatory * * * [Such doctrine cannot be tolerated under the Constitution.] It is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

"Why otherwise does it [the Constitution] direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!" Marbury v. Madison, 1 Cranch 137, 178–180, 2 L.Ed. 60.

The above quoted language of Chief Justice Marshall applies with equal force to the evasion practiced by this court in subverting the clear mandate of this provision of the Constitution to the additional requirements imposed by the Levering Act.

The principle here involved is of tremendous importance to those who believe in preserving the constitutional guarantees of fundamental civil liberties. These constitutional guarantees were written in the light of bitter experiences arising out of the exercise of arbitrary power or usurpation of power by the legislative or executive branch of the government. Constitutions were written to protect the individual against the exercise of such arbitrary power. The lessons of history reveal that at various times under the stress of inflamed public opinion both the Legislature and the Executive have attempted to circumvent constitutional restrictions by adopting measures which seemed expedient in view of the exigencies of the situation at hand. In my opinion the Levering Act is such a measure. I think it is apparent from the language of the act that its proponents believed that the Legislature had the power to prescribe a different oath for all employees of the state except the constitutional officers, and that it was under this mistaken belief that the act was adopted. Now that this court has held that the constitutional prohibition against any other oath, declaration or test applies to every state and local officer and employee, the Levering Act which was designed to apply to all employees of the state except constitutional officers, should fall.

To my mind it is too plain to permit of argument that it was the intention of the framers of the Constitution that "no other oath, declaration or test" should ever be required of any public officer or employee of the state or any of its political subdivisions than that specifically provided for in Article XX, section 3 of the Constitution. The action taken at the constitutional conventions clearly demonstrates the correctness of this position. The defeat of proposed amendments which sought to enlarge the scope of the oath, the failure to confer upon the Legislature power to do anything other than *exempt* such inferior officers as it saw fit from taking the prescribed oath and the specific prohibition against requiring any "other oath, declaration, or test * * * as a qualification for any office or public trust", makes it crystal clear that the framers of the Constitution intended to prevent just what the Levering Act is designed to accomplish. In other words they sought to limit and define the power of the Legislature in what history had revealed to be a most controversial field. Such being the obvious and unmistakable intention of the framers of the Constitution, the language of Chief Justice Marshall in Marbury v. Madison, supra, is particularly pertinent: "* * * [T]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended to be restrained? *It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.* Between these two alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative act, and, like other acts, is alterable when the legislature shall please to alter it. * * * If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? *It is emphatically the privilege and duty of the judicial department to say what the law is.* * * * So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules shall govern the case. This is of the very essence of judicial duty."

But the majority of this court by its decisions in these cases is forsaking its sworn duty to support the Constitution of the State of California, and has abdicated its power, for the sake of expediency, to uphold an act which invades the constitutional guarantees of civil liberties of those affected by its mandates.

There is no question of loyalty involved in any of these cases. So far as appears from the records before us every employee here involved was fully investigated and there is no suggestion of any conduct even bordering on subversive activity on the part of any of them. They have merely sought to stand on their constitutional right to take the one and only oath which the Constitution prescribed. On this stand I unqualifiedly join them.

I would, therefore, grant the writ prayed for and restore petitioner to his position.

Rehearing denied; CARTER, J., dissenting.

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39 Cal.2d 708

TOLMAN et al. v. UNDERHILL et al.

Sac. 6211.

Supreme Court of California, in Bank.

Oct. 17, 1952.

Original proceeding in mandamus to compel issuance to each petitioner of a letter of appointment to his regular post on faculty of University of California. The Supreme Court, Gibson, C. J., held that legislature in enacting statutes containing scheme requiring state employees to execute a prescribed oath relating to loyalty and faithful performance of duty intended to fully occupy such field of legislation and that Regents of University of California could not pass valid resolutions requiring University personnel to execute another oath or declaration relating to loyalty.

Carter, J., dissented.

Prior opinion, 229 P.2d 447.

1. Colleges and Universities ⚷7

Laws passed by legislature under its general police power prevail over regulations made by regents of university of California with regard to matters which are not exclusively university affairs.

2. Constitutional Law ⚷12

Constitutional limitations upon legislature's powers are to be strictly construed.

3. Municipal Corporations ⚷111(2)

Adoption of local rules supplementary to state law is proper under some circumstances, but local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute.

4. Municipal Corporations ⚷111(2)

Where legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to exclusion of all local regulation is not to be measured alone by language used but by whole purpose and scope of legislative scheme.

5. Colleges and Universities ⚷8

Legislature in enacting statutes containing scheme requiring state employees to execute prescribed oath relating to loyalty and faithful performance of duty, intended to fully occupy such field of legislation, and regents of University of California could not require university personnel to execute another oath or declaration relating to loyalty. Government Code, §§ 1360 et seq., 3103–3109; Const. art. 20, § 3.

Stanley A. Weigel, San Francisco, for petitioners.

Pillsbury, Madison & Sutro, Eugene M. Prince and Francis R. Kirkham, San Francisco, for respondents.

Harold W. Kennedy, County Counsel, and Gerald G. Kelly, Asst. County Counsel, Los Angeles, as amici curiae on behalf of respondents.

GIBSON, Chief Justice.

This is an original proceeding in mandamus to compel the Regents of the University of California, through their secretary, Underhill, to issue to each petitioner a letter of appointment to his regular post on the faculty of the university.

On April 21, 1950, the regents passed a resolution which provided that, effective with the academic year beginning July 1, "conditions precedent to employment or renewal of employment of American citizens in the University shall be (1) execution of the constitutional oath of office required of public officials of the State of California and (2) acceptance of appointment by a letter which shall include the following provision:

> "'Having taken the constitutional oath of office required of public officials of the State of California, I hereby formally acknowledge my acceptance of the position and salary named, and also state that I am not a member of the Communist Party or any other organization which advocates the overthrow of the Government by force or violence, and that I have no commitments in conflict with my responsibilities with respect to impartial scholarship and free pursuit of truth. I understand that the foregoing statement is a condition of my employment and a consideration of payment of my salary.'"

Petitioners have taken an oath identical to that prescribed in section 3 of article XX of the state Constitution, as required of all state employees by section 18150 et seq. of the Government Code.[1] However, when notified of their appointment to their regular positions on the faculty for the academic year, petitioners refused to execute letters of acceptance in the form required by the resolution and have brought the present proceeding claiming that the requirement is invalid.

We need not discuss the numerous questions raised by petitioners with regard to alleged violation of their civil rights and impairment of contract because we are satisfied that their application for relief must be granted on the ground that state legislation has fully occupied the field and that university personnel cannot properly be required to execute any other oath or declaration relating to loyalty than that prescribed for all state employees.

The historical background of the established practice of limiting the number and types of oaths and tests which may be required as a qualification for public employment has been discussed in our opinion in Pockman v. Leonard, Cal.Sup., 249 P.2d 267. In California our Constitution has always provided that members of the Legislature and all executive and judicial officers except such inferior officers as may be exempted by law, shall take the oath now set out in section 3 of article XX, and that "no other oath, declaration, or test, shall be required as a qualification for any office or public trust." The state Legislature has never exempted any public officer or employee from taking the constitutional oath but, to the contrary, has expressly provided that it shall be required of every state employee and, by a series of statutes, has enacted a general and comprehensive scheme relating to execution and filing of the oath by all such persons.

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[1] The oath prescribed by section 3 of article XX is as follows: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of ——————, according to the best of my ability."

Gov. Code, § 18150 et seq. provides that an identical oath shall be taken by all state employees.

Section 1360 of the Government Code provides that before any officer enters on the duties of his office he shall take and subscribe to an oath which is identical with that set forth in section 3, article XX of the Constitition. Enacted 1943. Based on on former Pol. Code, § 904, (1872). Section 1364 makes it unlawful to remove a person "from an office or position of public trust" because of his failure to comply with the law, charter or regulation prescribing an additional test or qualification, other than tests and qualifications provided for under civil service and retirement laws, if he has taken or offers to take the oath prescribed by section 1360. And section 1365 states that an officer cannot lawfully be removed from office because of his refusal to require additional tests or qualifications of persons he appoints to positions of public trust. Enacted 1943. Based on Stats.1901, ch. 167, p. 552. In 1941 the Legislature enacted laws requiring all state employees, whether members or non-members of civil service, to take an oath identical with the constitutional oath, Stats. 1941, ch. 159, p. 1199 and ch. 236, p. 1302, and this requirement was incorporated into the Government Code as section 18150 et seq. in 1945. Section 18152 provides, as to non-members of civil service, that the manner of taking and filing the oath required by section 18150 shall be the same as is provided for oaths taken pursuant to section 1360, and section 18154 provides that refusal to take the oath shall result in forfeiture of position. As to members of civil service, section 18153 prescribes the manner of taking and filing the oath, section 18155 provides that refusal to take the oath shall be grounds for dismissal, and section 18156 states that every civil service employee who takes the oath within the time prescribed by section 18150 et seq. "is conclusively presumed to have been and to be legally holding his position as far as laws requiring him to take, subscribe, or file an oath are concerned."[2]

[1, 2] Respondents contend that state legislation like sections 1360 et seq. and 18150 et seq. of the Government Code is inapplicable to university personnel because of that portion of section 9 of article IX of the state Constitution which provides that the University of California shall be administered by the regents, "with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds." It is well settled, however, that laws passed by the Legislature under its general police power will prevail over regulations made by the regents with regard to matters which are not exclusively university affairs. See Wallace v. Regents, 75 Cal. App. 274, 278, 242 P. 892; Williams v. Wheeler, 23 Cal.App. 619, 624–625, 138 P. 937. There can be no question that the loyalty of teachers at the university is not merely a matter involving the internal affairs of that institution but is a subject of general statewide concern. Constitutional limitations upon the Legislature's powers are to be strictly construed, and any doubt as to its paramount authority to require University of California employees to take an oath of loyalty to the state and federal Constitutions will be resolved in favor of its action. Cf. Collins v. Riley, 24 Cal.2d 912, 915–916, 152 P.2d 169.

[3, 4] Although the adoption of local rules supplementary to state law is proper under some circumstances, it is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute. Pipoly v. Benson, 20 Cal.2d 366, 370–371, 125 P.2d 482, 147 A.L.R. 515; Eastlick v. City of Los Angeles, 29 Cal.2d 661, 666, 177 P.2d

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[2] The provisions of §§ 18150–18158 were superseded in 1950 by Government Code §§ 3103–3109, commonly known as the Levering Act, which requires all city, county and state employees to take a loyalty oath which is substantially the same as the constitutional oath. See Pockman v. Leonard, Cal.Sup., 249 P.2d 267. The act did not go into effect until several months after the filing of the present proceeding, and the question of its operation is not directly involved in this case. Cf. Fraser v. Regents of U. C., Cal.Sup., 249 P.2d 283.

558, 170 A.L.R. 225. Determination of the question whether the Legislature has undertaken to occupy exclusively a given field of legislation depends upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate. Eastlick v. City of Los Angeles, supra, 29 Cal.2d at page 666, 177 P.2d 558; Pipoly v. Benson, supra, 20 Cal. 2d at pages 372–375, 125 P.2d 482; In re Iverson, 199 Cal. 582, 586–587, 250 P. 681; Ex parte Daniels, 183 Cal. 636, 642, 643, 192 P. 442, 21 A.L.R. 1172. Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. Eastlick v. City of Los Angeles, supra, 29 Cal.2d at page 666, 177 P.2d 558; Pipoly v. Benson, supra, 20 Cal. 2d at pages 371–373, 125 P.2d 482; Ex parte Daniels, supra, 183 Cal. at pages 642–643, 192 P. 442.

It is immediately apparent, upon applying these tests to the statutes here involved, that the loyalty of state employees is not a matter as to which there may reasonably be different standards and different tests but is, without doubt, a subject requiring uniform treatment throughout the state. As we have already seen, the Legislature has enacted a general and detailed scheme requiring all state employees to execute a prescribed oath relating to loyalty and faithful performance of duty, and it could not have intended that they must at the same time remain subject to any such additional loyalty oaths or declarations as the particular agency employing them might see fit to impose. Multiplicity and duplication of oaths and declarations would not only reflect seriously upon the dignity of state employment but would make a travesty of the effort to secure loyal and suitable persons for government service.

[5] We are satisfied that the Legislature intended to occupy this particular field of legislation by enacting Government Code sections 1360 et seq. and 18150 et seq. and that there is no room left for supplementary local regulation. Cf. Pipoly v. Benson, 20 Cal.2d 366, 371, 373, 125 P.2d 482; Eastlick v. City of Los Angeles, 29 Cal.2d 661, 666–667, 177 P.2d 558. The declaration as to loyalty required by the regents is, accordingly, invalid.

No question is raised as to petitioners' loyalty or as to their qualifications to teach, and they are entitled to a writ directing respondents to issue to each of petitioners a letter of appointment to his post on the faculty of the university upon his taking the oath now required of all public employees by the Levering Act. See Fraser v. Regents of U. C., Cal.Sup., 249 P.2d 283.

Let a writ of mandate issue for the limited purpose above indicated.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in Pockman v. Leonard, this day filed, Cal.Sup., 249 P.2d 267, I would issue a writ of mandate as prayed for in the petition.

39 Cal.2d 717

FRASER v. REGENTS OF UNIVERSITY OF CALIFORNIA et al.

S. F. 18428.

Supreme Court of California, in Bank.
Oct. 17, 1952.

Rehearing Denied Nov. 14, 1952.

Original proceeding in mandamus to compel respondents to reinstate petitioner to position of instructor at the University of California and to pay petitioner compensation in accordance with terms of petitioner's contract of employment. The Supreme Court, Gibson, C. J., held that Act requiring state employees to execute a prescribed oath relating to loyalty and faithful performance of duty fully occupies field of legislation on subject of loyalty oaths for public employees and that oath prescribed by such Act is the only oath or declaration of loyalty which may be required of teachers at the University of California as a condition of their employment.

Order in accordance with opinion.

Carter, J., dissented.

Colleges and Universities ⚷8

The Act requiring state employees to execute a prescribed oath relating to loyalty and faithful performance of duty fully occupies field of legislation on subject of loyalty oaths for public employees, and oath prescribed by such Act is only oath or declaration of loyalty which may be required of teachers at University of California as a condition of their employment. Government Code, §§ 3100–3109.

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Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, and Nanette Dembitz, New York City, for petitioner.

Calkins, Hall, Conard & Johnson, Jno. U. Calkins, Jr., A. H. Conard and John E. Landon, San Francisco, for respondents.

GIBSON, Chief Justice.

Petitioner brought this original proceeding in mandamus to compel respondents to reinstate him to the position of instructor at the University of California and to pay him compensation in accordance with the terms of his contract of employment. Respondents' return to the alternative writ was by demurrer and answer. Inasmuch as we have concluded that the demurrer must be sustained, it is unnecessary to give any consideration to the issues of fact raised by the answer.

Petitioner alleges that he was discharged from his position as instructor because of his failure to execute the oath required by sections 3100–3109 of the Government Code, known commonly as the Levering Act. Stats.1951, 3rd Ex.Sess.1950, ch. 7, p. 15. At the time of his appointment for the academic year July 1, 1950, to June 30, 1951, petitioner, as required by section 18150 et seq. of the Government Code, took an oath identical to that prescribed in section 3 of article XX of the state Constitution. In addition, he signed the regents' declaration relating to loyalty which has been held invalid in Tolman v. Underhill, Cal.Sup., 249 P.2d 280. After the effective date of the Levering Act, October 3, 1950, petitioner refused to take the oath prescribed therein for all public employees, and he alleges that he was discharged on December 31, 1950.

The constitutionality of the Levering Act was sustained in Pockman v. Leonard, Cal. Sup., 249 P.2d 267. With reference to the applicability of such legislation to university employees, we held in Tolman v. Underhill, Cal.Sup., 249 P.2d 280, that the loyalty of teachers at the university is a matter of general statewide concern, and that section 18150 et seq. of the Government Code, requiring all state employees to take an oath identical with that prescribed by our state Constitution, applied to members of the faculty of the university. The Levering Act in effect supersedes section 18150 et seq. and expressly provides that compliance with its terms shall, as to state employees, be deemed full compliance with those sections. Gov.Code, § 3106. Accordingly, there can be no question that the act is applicable to university employees, and the language and purpose of the statute, together with the reasoning of our decision in Tolman v. Underhill, make it evident that the act fully occupies the field of legislation on the subject of loyalty oaths for public employees. Bowen v. Los Angeles County, Cal.Sup., 249 P.2d 285. The oath prescribed by the Levering Act is, therefore, the only oath or declaration of loyalty which may now be required of teachers at the university as a condition of their employment. Since petitioner refused to take that oath, he is not entitled to reinstatement.

The demurrer is sustained, the alternative writ is discharged, and the peremptory writ is denied.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in Pockman v. Leonard, Cal.Sup., 249 P.2d 267, I would issue a writ of mandate as prayed for in the petition.

Rehearing denied; CARTER, J., dissenting.

39 Cal.2d 714

BOWEN v. LOS ANGELES COUNTY et al.

L. A. 22012.

Supreme Court of California, in Bank.
Oct. 17, 1952.

Rehearing Denied Nov. 14, 1952.

Original proceeding in mandamus by county civil service employee for reinstatement and payment of compensation which was withheld following petitioner's suspension for refusing to sign loyalty oath required of public employees by statute. The Supreme Court, Gibson, J., held that statute requiring state employees to execute a prescribed oath relating to loyalty and faithful performance of duty fully occupies field of legislation on subject of loyalty oaths for public employees and that oath prescribed by such statute is only oath or declaration relating to loyalty which may be required of Los Angeles County employees as a condition of their employment.

Order in accordance with opinion.

Carter, J., dissented.

1. Counties 🔑64

Statute requiring state employees to execute a prescribed oath relating to loyalty and faithful performance of duty does not impose a religious or political test and is not violative of provisions of county charter that no person in county classified service, or seeking admission thereto, should be discriminated against because of his political or religious opinions or affiliations. Government Code, §§ 3100–3109; Const. art. 11, § 7½.

2. Counties 🔑64

States 🔑47

Section of state constitution which authorizes county charters to provide for regulation by boards of supervisors of appointment, duties, qualifications and compensation of county employees, does not limit authority of legislature to make regulations under its police power concerning loyalty of persons in service of state and its political subdivisions. Const. art. 11, § 7½.

3. Counties 🔑64

Statute requiring state employees to execute a prescribed oath relating to loyalty and faithful performance of duty fully occupies field of legislation on subject of loyalty oaths for public employees, and oath prescribed by such statute is only oath or declaration relating to loyalty which may be required of Los Angeles County employees as a condition of their employment. Government Code, §§ 3100–3109.

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Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, and Nanette Dembitz, New York City, Richard W. Petherbridge, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel and Robert L. Trapp, Deputy County Counsel, Los Angeles, for respondents.

GIBSON, Chief Justice.

Petitioner, a Los Angeles County civil service employee, was discharged because she refused to sign the oath required of all public employees by the Levering Act, Gov. Code, §§ 3100–3109, and she has brought this original proceeding in mandamus seeking reinstatement and payment of compensation which was withheld following her suspension.

Before the Levering Act went into effect, petitioner executed an oath almost identical with that prescribed in section 3 of article XX of the state Constitution, and she also took the oath and made the affidavits required by the board of supervisors of Los Angeles County.[1] Thereafter she was directed by her superior to take the oath prescribed by the Levering Act, and upon her refusal to do so she was suspended without pay as of October 30 and was discharged on November 29, 1950.

[1] Nearly all of the questions raised by petitioner with respect to the constitutionality and application of the Levering Act have been answered adversely to her in Pockman v. Leonard, Cal.Sup., 249 P.2d 267. She makes two additional contentions, however, with respect to asserted conflicts between the act and the provisions of the Los Angeles County Charter. The first of these, namely that the oath requirement

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[1] Hirschman v. Los Angeles County, Cal.Sup., 249 P.2d 287.

violates section 41 of the charter,[2] falls by reason of our holding in the Pockman case, Cal.Sup., 249 P.2d 267, that the Levering oath does not constitute a religious or political test.

[2] Secondly, petitioner contends that the Levering Act is inapplicable to her because, she asserts, the power to regulate the qualifications of county employees is governed exclusively by the provisions of the Los Angeles County Charter adopted pursuant to section 7½ of article XI of the state Constitution which authorizes county charters to provide for the regulation by boards of supervisors of the appointment, duties, qualifications and compensation of county employees. Under the charter the board of supervisors is empowered to provide for the appointment and compensation of county employees, a civil service system is set up, and the power to prescribe rules for the classified service is vested in a county commission. L.A.County Charter, §§ 11, 34. There is nothing in section 7½, however, which can be construed as in any way limiting the authority of the Legislature to make regulations under its police power concerning the loyalty of persons in the service of the state and its political subdivisions. We held in Pockman v. Leonard, Cal.Sup., 249 P.2d 267, that the Levering Act was adopted by the Legislature in the exercise of its police power, and there can be no doubt that the loyalty of county employees is not exclusively a local affair but is a matter of general statewide concern.

[3] It follows that the Levering Act is applicable to employees of Los Angeles County, and it is evident from the language and purpose of the act that it fully occupies the field of legislation on the subject of loyalty oaths for public employees. Cf. Fraser v. Regents of University of California, Cal.Sup., 249 P.2d 283; Tolman v. Underhill, Cal.Sup., 249 P.2d 280. The act establishes a general and detailed plan with uniform standards for all public employees, and, as we have held in the Tolman case, Cal.Sup., 249 P.2d 280, with respect to earlier statutes, the act precludes the imposition of supplementary local requirements. The oath precribed by the Levering Act is, therefore, the only oath or declaration relating to loyalty which may now be required of Los Angeles County employees as a condition of their employment. Cf. Fraser v. Regents of University of California, Cal.Sup., 249 P.2d 283.

Since petitioner refused to execute the Levering oath, she is not entitled to reinstatement. She is, however, entitled to compensation for services rendered up to and including thirty days following October 3, 1950, the effective date of the Levering Act. Pockman v. Leonard, Cal. Sup., 249 P.2d 267.

Petitioner's application for a writ directing her reinstatement as a civil service employee is denied. Let a writ of mandate issue for the limited purpose of directing payment of petitioner's salary up to and including thirty days after October 3, 1950.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in Pockman v. Leonard, Cal.Sup., 249 P.2d 267, I would issue a writ of mandate as prayed for in the petition.

Rehearing denied; CARTER, J., dissenting.

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[2] Section 41 provides: "No person in the [county] classified service, or seeking admission thereto, shall be appointed, reduced or removed or in any way favored or discriminated against because of his political or religious opinions or affiliations."

HIRSCHMAN et al. v. LOS ANGELES COUNTY et al.

L. A. 22035.

Supreme Court of California, in Bank.
Oct. 17, 1952.

Rehearing Denied Nov. 14, 1952.
See 250 P.2d 145.

Proceedings by permanent civil service employees of county of Los Angeles to compel their reinstatement and payment of wages retroactive to date of discharge because of their refusal to execute oath and affidavits prescribed by orders of county board of supervisors. The Superior Court, Los Angeles County, W. Turney Fox, J., rendered a judgment adverse to the petitioners and they appealed. The Supreme Court, Gibson, C. J., held that requirement of orders of county board of supervisors directing county employees to swear that they are not, and since specified date, had not been, a member of any organization advocating overthrow of government by force or violence, is valid.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 231 P.2d 140.

1. Counties 🔑64

Under provision of oath and affidavit prescribed by orders of county board of supervisors of county of Los Angeles, which directed county employee to swear that he is not, and since specified date, has not been, a member of any organization advocating overthrow of government by force or violence, including therein named organizations if they should be determined by court to advocate overthrow of government by force or violence, county employees were required to designate only those named organizations which they knew advocated overthrow of government by force, or which to their knowledge had been held by a court to advocate such action, and such requirement is valid.

2. Officers 🔑36(1), 64, 110

Public employees may properly be required to furnish information regarding their membership in organizations which, to their knowledge, have advocated overthrow of government by force or violence.

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Margolis & McTernan, John T. McTernan, William B. Murrish, Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, and Nanette Dembitz, New York City, for appellants.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel and Robert L. Trapp, Deputy County Counsel, for respondents.

GIBSON, Chief Justice.

Plaintiffs, permanent civil service employees of the County of Los Angeles, were discharged because they refused to execute the oath and affidavits prescribed by orders of the county board of supervisors made in 1947 and 1948.[1] The county civil service commission sustained the discharges after a hearing upon stipulated facts, and plaintiffs sought a writ of mandate in the superior court to compel their reinstatement and the payment of wages retroactive to the date of discharge. This appeal was taken from the judgment denying the requested relief.

The oath and affidavits are as follows:

> "A. Oath of Office or Employment
>
> "I, ——— do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and laws of the State of California, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office or employment on which I am about to enter or am now engaged. So Help Me God.

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[1] The oath and affidavits as originally adopted in August, 1947, were upheld by the District Court of Appeal in Steiner v. Darby, 88 Cal.App.2d 481, 199 P.2d 429. On December 5, 1949, under the title of Parker v. Los Angeles County, 338 U.S. 327, 70 S.Ct. 161, 94 L.Ed. 144, writs of certiorari were dismissed by the United States Supreme Court on the ground that the federal questions presented were "not ripe for decision."

"B. Affidavit Re Subversive Activity.

"I do further swear (or affirm) that I do not advocate, nor am I now a member, nor have I been since December 7, 1941, a member of any political party or organization that advocates the overthrow of the Government of the United States or State of California, or County of Los Angeles, by force or violence, except those specified as follows: ———— (the organizations here to be listed embrace all organizations advocating the overthrow of government by force or violence including any of the hereinafter named if they should ever be determined by a court of law to advocate the overthrow of government by force or violence); and that during such time as I am an officer or employee of the County of Los Angeles, I will not advocate nor become a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles, by force or violence.

"C. Affidavit Re Aliases

"I do further swear (or affirm) that I have never used or been known by any names other than those listed as follows: ————————.

"D. Membership In Organizations

"I do further swear (or affirm) that I have never been a member of, or directly or indirectly supported or followed any of the hereinafter listed organizations, except those that I indicate by an X mark." [Next follows a list of 142 organizations which were selected from those mentioned in one or more of the reports of the Joint Fact-Finding Committee of the California Legislature on Un-American Activities in California.]

All of the facts pertinent to this case were stipulated to by the parties when the matter was before the county civil service commission. It appears that plaintiffs were given an opportunity to take the oath and make the affidavits but did not do so. Thereafter, on April 27, 1948, the board of supervisors ordered all department heads to direct the employees under them to execute the oath and affidavits immediately. Plaintiffs were advised of this order and were informed that refusal to comply would be considered insubordination. On or about May 5 plaintiffs refused to obey the order on the ground that the oath and affidavits were unconstitutional.

On July 20 a new order was adopted by the supervisors which provided as follows: "(1) That unless the employee executes parts A, B and C of the oath and affidavit attached hereto and made a part of this order, by 5:00 P.M. on the 26th day of July, 1948, that the department head will discharge such employee at that time. (2) That if the employees refuse on the 26th day of July, 1948, to execute paragraph D of said oath and affidavit they will be discharged for such refusal if and when the loyalty test litigation now pending is finally concluded with a determination that the County was justified in requiring from its employees the information embodied in paragraph D." Thereupon plaintiffs were directed by the heads of their departments to execute "parts A, B and C of said oath and affidavit," and they refused to take "the oath and affidavit or parts A, B and C" within the prescribed time. Plaintiffs were notified that they were discharged as of July 26 on the ground of insubordination because of refusal to execute the oath and affidavits in full on May 5, and refusal to execute parts A, B and C pursuant to the order of July 20.

The civil service commission held a hearing to review the discharges, and on November 23, 1948, it found and concluded that plaintiffs' "failure to sign the Loyalty Oath and Paragraphs A, B, and C of the Affidavit, after having been ordered to do," justified their dismissals for insubordination. The decision of the commission makes no reference to paragraph D or to plaintiffs' failure to take the oath and make all of the affidavits as directed by the supervisors in their order of April 27, 1948. As noted above, the board's order of July 20, 1948, provided that employees who refused to execute part D "will be discharged for such refusal if and when the loyalty test litigation now pending is finally concluded with a determination that the County was justified in requiring from its employees the information embodied in paragraph D." The "pending" litigation referred to by the supervisors, Steiner v. Darby, 88 Cal.App.2d 481, 199 P.2d 429, was not finally concluded when the civil service commission rendered its decision sustaining the discharges. Therefore, under the terms of the board's order, the commission could not properly consider plaintiffs' failure to execute part D as a ground for dismissal, and the commission's decision shows that it was based on and restricted to plaintiffs' refusal to execute paragraphs A, B and C. The trial court concluded that plaintiffs' refusal to execute parts A, B and C constituted insubordination and sufficient cause for discharge, and in view of the commission's decision we may disregard the further conclusion of the trial court that plaintiffs' earlier refusal to execute paragraphs A, B, C and D likewise furnished sufficient cause for dismissal. It follows that we need not pass upon the issues raised with respect to part D, and inasmuch as plaintiffs stipulate that they do not have, and never did have, any objection to paragraphs A and C, the validity of paragraph B is all that remains to be considered.

[1, 2] Substantially the same provisions as appear in paragraph B are to be found in the oath prescribed by the Levering Act, Gov.Code, §§ 3100–3109, the validity of which was upheld in Pockman v. Leonard, Cal.Sup., 249 P.2d 267.[2] There is only one difference between the two which requires discussion. The employee is directed by paragraph B to swear that he is not, and since December 7, 1941, has not been, a member of any organization which advocates the overthrow of the government by force, except those which he lists in a space provided for that purpose, and immediately under this space appears the following: "(the organizations here to be listed embrace all organizations advocating the overthrow of government by force or violence including any of the hereinafter named if they should ever be determined by a court of law to advocate the overthrow of government by force or violence)." The "hereinafter named" organizations referred to are those listed in paragraph D, and the county concedes that each employee was expected merely to fill out the form in accordance with his information on the date that he executed the document. The quoted language, when properly construed, required plaintiffs to designate only those of the named organizations which they knew advocated overthrow of the government by force, or which to their knowledge had been held by a court to advocate such action. They were not required to speculate upon what the courts might determine in the future. As thus interpreted, the requirement was sufficiently certain to be understood and applied, and it must be sustained under our decision in Pockman v. Leonard, Cal.Sup., 249 P.2d 267, that public employees may properly be required to furnish information regarding their memberships in organizations which, to their knowledge, have advocated the overthrow of the government by force and violence.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in Pockman v. Leonard, this day filed, Cal.Sup., 249 P.2d 267, I would reverse the judgment with directions to the trial court to issue a writ of mandate in accordance with the prayer of plaintiff's complaint.

Rehearing denied; CARTER, J., dissenting. See 250 P.2d 145.

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[2] The Levering Act did not go into effect until after plaintiffs were discharged, and the question of its operation is not involved here. It may be noted, however, that the oath and affidavits which are before us in the present case cannot now be properly required by the county, since the Levering Act has fully occupied the field of legislation on the subject of loyalty oaths for public employees in California. Bowen v. Los Angeles County, Cal.Sup., 249 P.2d 285, cf. Fraser v. Regents of U. C., Cal.Sup., 249 P.2d 283.

39 Cal.2d 889

John HOROWITZ, petitioner, v. Louis G. CONLAN, as President of San Francisco City College, et al., respondents.

S. F. 18347.

Supreme Court of California, in Bank.

Oct. 17, 1952.

Rehearing Denied Nov. 14, 1952.

Application for Writ of Mandate.

Wayne M. Collins, San Francisco, for petitioner.

Benjamin Dreyfus, Francis J. McTernan, Jr., Norman Leonard, San Francisco, Jonathan Rowell, Redwood City, Laurence R. Sperber, Beverly Hills, William B. Murrish, Los Angeles, Hugh B. Miller and Charles R. Garry, San Francisco, as amici curiae on behalf of petitioner.

Dion R. Holm, City Atty., Walker Peddicord, Deputy City Atty., Irving G. Breyer, San Francisco, M. P. McCaffrey and Frank P. Mack, Jr., Sacramento, for respondents.

PER CURIAM.

This original proceeding in mandamus was brought by a teacher who was employed by the San Francisco Unified School District and had teacher's tenure. The issues raised are identical with those in Pockman v. Leonard, Cal.Sup., 249 P.2d 267 this day decided, and on the authority of that case petitioner is entitled to payment of compensation for services rendered up to and including thirty days following October 3, 1950, the effective date of sections 3100–3109 of the Government Code, Stats.1951, 3rd Ex.Sess.1950, ch. 7, p. 15, but, having failed to take the required oath, he is not entitled to compensation for any subsequent period.

Insofar as petitioner seeks payment of salary or other relief for any period subsequent to thirty days after October 3, 1950, the application is denied. Let a writ of mandate issue for the limited purpose of directing payment of petitioner's salary up to and including thirty days after October 3, 1950.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in Pockman v. Leonard, this day filed, Cal.Sup., 249 P.2d 267, I would issue a writ of mandate as prayed for in the petition.

Rehearing denied; CARTER, J., dissenting.

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39 Cal.2d 890

Edward L. HANCHETT, petitioner, v. Ralph H. LEHMAN, as Principal of the High School of Commerce, et al., respondents.

S. F. 18346.

Supreme Court of California, in Bank.

Oct. 17, 1952.

Rehearing Denied Nov. 14, 1952.

Application for Writ of Mandate.

Wayne M. Collins, San Francisco, for petitioner.

Dion R. Holm, City Atty., Walker Peddicord, Deputy City Atty., Irving G. Breyer, San Francisco, M. P. McCaffrey, and Frank P. Mack, Jr., Sacramento, for respondents.

PER CURIAM.

This original proceeding in mandamus was brought by a probationary teacher employed by the San Francisco Unified School District. The issues raised are identical with those in Pockman v. Leonard, Cal. Sup., 249 P.2d 267, this day decided, and on the authority of that case petitioner is entitled to payment of compensation for services rendered up to and including thirty days following October 3, 1950, the effective date of sections 3100–3109 of the Government Code, Stats.1951, 3rd Ex.Sess. 1950, ch. 7, p. 15, but, having failed to take the required oath, he is not entitled to compensation for any subsequent period.

Insofar as petitioner seeks payment of salary or other relief for any period subsequent to thirty days after October 3, 1950, the application is denied. Let a writ of mandate issue for the limited purpose of directing payment of petitioner's salary up to and including thirty days after October 3, 1950.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in Pockman v. Leonard, this day filed, Cal.Sup., 249 P.2d 267, I would issue a writ of mandate as prayed for in the petition.

Rehearing denied; CARTER, J., dissenting.

113 Cal.App.2d 833

MONARCH WINE CO., Inc. et al. v. BUTTE et al.

No. 15234.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1952.

Action against national banking association to recover proceeds of certain fire insurance policies. The Superior Court, in and for the City and County of San Francisco, Clarence W. Morris denied bank's motion for change of venue, and it appealed. The District Court of Appeal, Bray, J., held that federal venue statute requiring action against National Bank to be brought in county of its residence is mandatory, and bank's application for change of venue to county of its residence should have been granted, even though state venue provisions would have allowed maintenance of action where it commenced.

Order reversed.

1. Banks and Banking 🔑233

In view of fact that national bank is a creature of federal and not state law, the question of where same can be sued is governed by the laws of the United States, and Congress has the power to require that national bank be sued only at the place of its residence. 12 U.S.C.A. § 94.

2. Dismissal and Nonsuit 🔑55

Federal Civil Procedure 🔑1742

Under federal venue statute applicable to suits against national banks, if action against such bank is brought in state court outside state of bank's location, action must be dismissed because of non-existence of procedure for transferring one's action from one state to another, but in case brought against bank in federal court in district other than that of bank's residence legislation providing procedure for transfer eliminates previous necessity for dismissal. 12 U.S.C.A. § 94.

3. Dismissal and Nonsuit 🔑53(1)

Under federal venue statute applicable to suits against national banks, where action against bank is brought in state court of state in which bank is located, but not in county of its location, and state law has procedure for change of venue, rule of federal cases is that the action must not be dismissed, but upon application must be transferred to the county in which the bank is located. 12 U.S.C.A. § 94.

4. Courts 🔑97(5)

Courts of California, in interpreting federal venue statute applicable to suits against national banks were bound by, and would interpret such statute in accordance with interpretation placed thereon by federal courts. 12 U.S.C.A. § 94; Code Civ.Proc. § 395.

5. Banks and Banking 🔑275

Provision of federal venue statute applicable to actions against national banks, requiring action to be tried in county of bank's residence is mandatory, and when defendant bank was sued in county other than its residence, its application for change of venue to county of residence should have been granted, notwithstanding provision of state venue statute which under the circumstances, would have authorized venue where the action was commenced. 12 U.S.C.A. § 94; Code Civ. Proc. § 395.

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Cosgrove, Cramer, Diether & Rindge, Los Angeles, Brobeck, Phleger & Harrison, Moses Lasky, Richard Haas, San Francisco, for appellant.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

BRAY, Justice.

Defendant Citizens National Trust & Savings Bank of Los Angeles[1] appeals from an order denying its motion for change of venue from the San Francisco superior court to that of Los Angeles County.

Question Presented.

Does Title 12 U.S.C.A. § 94, give a national bank, regardless of the California venue laws, the right to have an action against it tried in the county of its residence?

Record.

Plaintiffs sued defendant and others in the San Francisco superior court on combined causes of action to recover proceeds of certain fire insurance policies. Defendant is a national banking association whose main office and banking house is in Los Angeles County. Defendant moved for change of venue to that county, relying upon section 94, hereafter set forth. One of the other defendants, Felix Butte, Jr., is a resident of San Francisco. Based on that fact and the provisions of section 395 of the Code of Civil Procedure, the motion was denied.

Section 94.

Title 12 U.S.C.A. § 94, provides: "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

[1] It is conceded that as a national bank is a creature of federal, rather than state law, its rights to sue or be sued are those granted and defined by congressional acts, and that the question of where it can be sued is governed by the laws of the United States. See Crofoot v. Giannini, 196 Misc. 213, 92 N.Y.S.2d 191; Burns v. Northwestern Nat. Bank of Minneapolis, Minn., 1935, 65 N.D. 473, 260 N.W. 253. Thus, there is no question but that the Congress has the power to require that the national banks be sued only at the place of residence. The question is, did it by the provisions of section 94, do so? The plain reading of the section would indicate that it did. Actions against a national bank "may be had in any district" (this obviously refers to districts of the federal courts) "or in any State, county, or municipal court in the county or city" in which the bank is located.

[2, 3] The federal cases interpreting section 94 seem to establish three propositions: (1) Where actions against a national bank are brought in a state court outside the state where it is located the action must be dismissed because there is no procedure for transferring the action from one state to another. See Schmitt v. Tobin, D. C., 15 F.Supp. 35, where an action brought in Nevada against a California national bank was dismissed. (2) Where the actions are brought in a federal court in a district other than that in which the bank is located the actions formerly were required to be dismissed as the federal law provided no procedure for transfer. See Leonardi v. Chase Nat. Bank of City of New York, 2 Cir., 81 F.2d 19, where the court dismissed an action brought against a national bank in a federal court in a district other than that of the bank's residence. To the same effect, International Refugee Organization v. Bank of America, etc., D. C., 86 F.Supp. 884, and Buffum v. Chase Nat. Bank of City of New York, 7 Cir., 192 F.2d 58. Such a procedure has now been provided and the case would now be transferred to the proper district. Plaintiffs concede that the law as to these two propositions is as above stated. (3) Where the action is brought in a state court of a state in which the bank is located but not in the county of its location, and where state law has a procedure for change of venue, the action must not be dismissed, but upon application must be transferred to the county in which the bank is located. There are three federal cases upon this subject. The first is First Nat. Bank of Charlotte v. Morgan, 132 U.S. 141, 10 S.

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[1] referred to as "defendant"

Ct. 37, 33 L.Ed. 282. There an action was brought in Cleveland County, North Carolina, against a national bank residing in Mecklenburg County of the same state for a penalty for charging the plaintiff a greater interest than the law allowed. The bank answered with a general denial and a plea of the statute of limitations. From a judgment against it the bank appealed, claiming that under section 5198 of the Revised Statutes (the predecessor of section 94 and containing practically the same language) the action could not be brought in a county other than that of the bank's residence. The court pointed out that the section gave national banking associations "exemption * * * from suits in state courts, established elsewhere than in the county or city in which such associations were located * * * for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts." 132 U.S. at page 145, 10 S.Ct. at page 38. The court then stated, in effect, that had the bank claimed the exemption when it apeared in the superior court of Cleveland County the action would have had to be transferred. The exemption was a personal privilege that the bank could and did waive. But having made defense upon the merits and not having chosen to claim immunity from suit in that court, it was too late now to claim it for the first time upon appeal. While the action there was one for a penalty under the then Bank Act, the decision cannot be limited to actions thereunder, as it was held in Leonardi v. Chase Nat. Bank, supra, 81 F. 2d 19, that the exemption was not restricted to actions under the particular act but to all actions against national banks.

Casey v. Adams, 102 U.S. 66, 26 L.Ed. 52, was an action concerning real property brought in a Louisiana state court, parish of La Fourche, against, among others, Casey, the receiver of a national bank established in New Orleans, which was in another parish. In considering the question of the effect of the predecessor of section 94 the court stated 102 U.S. at pages 67–68: "* * * sect 5198 * * * we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the lcoality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem,* and are to be prosecuted where the thing on which they are founded is situated. To give the act of Congress the construction now contended for would be in effect to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located." That case was decided in 1880 and First Nat. Bank of Charlotte v. Morgan, supra, 132 U. S. 141, 10 S.Ct. 37, in November, 1889. In March 1890, came Fresno National Bank v. Superior Court, 83 Cal. 491, 24 P. 157. There a national bank whose residence was in Fresno County sought to prohibit the superior court of San Joaquin County from further proceeding in an action brought against the bank on a building contract. The bank contended, among other grounds, that section 5198, U.S.Rev. Stats., denied *jurisdiction* to any state court except the court of the county of the bank's residence. In determining this question the court referred to Casey v. Adams, supra, 102 U.S. 66, 26 L.Ed. 52, saying that the remark of the Supreme Court therein that section 5198 "relates to transitory actions only" was not necessary to the decision and "there is nothing in section 5198 relating to the distinction between local and transitory actions." 83 Cal. at page 499, 24 P. at page 159. It then referred to section 5136, Rev. Stats., which provides that national banks "'shall have power * * * Fourth, to sue and be sued, complain and defend, *in any court of law and equity,* as fully as natural persons'" and quoted from Claflin v. Houseman, 93 U.S. 130, 23 L.Ed. 833, to the effect that these sections of the Revised Statutes gave state courts *jurisdiction* of actions by and against national banks. It stated that there is nothing in the distinction between local and transitory actions which should affect the application of these sections "except, perhaps, when local actions are purely *in rem,* and therefore require no actual service of process upon any person, natural or artificial." 83 Cal. at page 500, 24 P. at page 160. It then held that the superior court of San Joaquin County had *jurisdiction* of the person of the defendant, but that, upon the showing made, that county was not the proper county in which to commence the action against the bank. However, as the bank had filed the necessary motion and demand for change of venue (which had not been acted upon) that motion gave the bank "a plain, speedy, and adequate remedy, in the ordinary course of law, for the error and wrong of commencing the action in an improper county." Thus, it is apparent that the court was considering the effect of the federal sections on *jurisdiction* and not *venue.* It is not clear from the opinion as to whether when it referred to the action being brought in an "improper county" it meant improper under section 5198 of the federal statute or under the California venue laws which it discussed, or both. Again the court gave no consideration to the Charlotte case, supra, which had been decided a few months before. In the two federal cases dealing with the exact subject it was held that the federal statutes gave national banks the right to have their cases tried in their own counties, except in actions of a local character. The Fresno National Bank case, supra, 83 Cal. 491, 24 P. 157, did not hold to the contrary. Its holding was, in effect, that the language in the Casey case did not imply that a state court other than that of the bank's residence was deprived of *jurisdiction* to have the suit brought in that court. To that extent the decision agrees with the holding in the Charlotte case, and in Leonardi v. Chase Nat. Bank of City of New York, supra, 81 F.2d 19, that section 5198 relates to venue, rather than jurisdiction.

The New York courts since 1883 in dealing with the question of whether the statute in question is mandatory or permissive, have held it mandatory, saying, "Where the meaning of a federal statute is to be ascertained, the decisions of the federal courts construing the statute are controlling on the state courts." Raiola v. Los Angeles First Nat. Trust & Savings Bank, 133 Misc. 630, 233 N.Y.S. 301, 305; see also Crofoot v. Giannini, supra, 92 N.Y.S.2d 191, and Rabinowitz v. Kaiser-Frazer Corporation, 198 Misc. 312, 96 N.Y.S.2d 638. While these were cases dealing with actions against national banks whose residences were outside the state we can see no difference in the language or the effect of that portion of section 94 referring to suits not brought in the state of the bank's residence and those not brought in the county of its residence. Crocker v. Marine National Bank of New York, 101 Mass. 240, and Burns v. Northwestern Nat. Bank of Minneapolis, Minn., supra, 260 N.W. 253, held the same way as the cited New York cases.

There are cases in other states holding that section 94 and its predecessor section were intended to be permissive and to confer jurisdiction upon proper state courts, leaving to such courts, after the action is commenced, the matter of a change of place of trial. In Curlee v. National Bank of Fayetteville, 187 N.C. 119, 121 S.E. 194, the court followed the reasoning of an early New York case expressly overruled by the later New York cases cited above. It also cited as authority the Fresno National Bank case, supra, which as we have pointed out above dealt with jurisdiction rather than venue. Continental Nat. Bank v. Folsom, 78 Ga. 449, 3 S.E. 269, was likewise based in part on the early New York case. In De Cock v. O'Connell, 188 Minn. 228, 246 N.W. 885, 248 N.W. 829, 86 A.L.R. 41; and Brust v. First Nat. Bank, 184 Wis. 15, 198 N.W. 749, the opinions were based on Levitan v. Houghton Nat. Bank, 174 Mich. 566, 140 N.W. 1019, which was not considering venue but jurisdiction as the trial court had dismissed the action because not brought in the county of the bank's residence. Stewart v. First Nat. Bank &

Trust Co. of Helena, 93 Mont. 390, 18 P.2d 801, based its decision on the Curlee, Brust and Fresno National Bank cases, among others.

First Nat. Bank of Linden v. Alston, 231 Ala. 348, 165 So. 241, on the other hand, in effect held the statute to be mandatory, but it followed the rule in the Casey case and found the action to be local rather than transitory. Merchants Nat. Bank v. Henderson, 218 Iowa 657, 254 N.W. 65, likewise followed the Casey case and held its action to be local in character.

Guerra v. Lemburg, Tex.Civ.App., 22 S.W.2d 336, contrary to the decisions in Leonardi v. Chase Nat. Bank of City of New York, supra, 81 F.2d 19, Schmitt v. Tobin, supra, 15 F.Supp. 35, and Rabinowitz v. Kaiser-Frazer Corp., supra, 96 N.Y.S.2d 638, held that section 94 applied only to actions for penalties for usury. Cassatt v. First Nat. Bank, 153 A. 377, 9 N.J.Misc. 222, without discussing the federal cases on the subject and in spite of them, held section 94 applied to jurisdiction and not to venue.

The language in Buffum v. Chase Nat. Bank of City of New York, supra, 192 F.2d 58, at page 60, although the court was dealing with an action brought against a bank in a state other than that of its residence, applies here: "The issue here then is not one of jurisdiction of the subject matter, but one as to the proper venue, the proper locality. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, at page 168, 60 S.Ct. 153, 84 L.Ed. 167. It seems clear that the proper venue, in the absence of waiver or consent, is determined by Section 94 of 12 U.S.C.A." And referring to Leonardi v. Chase Nat. Bank of City of New York, supra, 81 F.2d 19, the court said 192 F.2d at page 60: "It was expressly held in that case that a suit against such a bank may be maintained only in the place of its establishment, i. e., its location."

[4, 5] In spite of the above decisions of some state courts we believe (1) we are bound by the decisions of the United States courts on the interpretation of section 94; (2) those courts have held directly in the Charlotte and Casey cases as to suits brought in the wrong county of a state and indirectly in other cases dealing with suits brought in the wrong state or in the wrong federal district, that section 94 is mandatory. Even though it is possible that the discussion in the Charlotte and Casey cases may have been dicta, as contended by plaintiff, the reasoning is the same as used in the cases dealing with actions in the wrong state and federal district. If it was intended that the national bank could be sued in any county of the state, it would have been sufficient for the section to state "in any state, county or municipal court of the state in which the bank is located." But the section said the action is to be brought in the "court in the county or city" in which the bank is located. (3) The plain and logical reading of the section shows that there is no difference in meaning between the various portions of the section, and (4) defendant is entitled as a matter of right under section 94 to a change of venue to the county of its residence. Hence the order denying its motion for such change was erroneous.

The order is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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114 Cal.App.2d 7

PEOPLE v. BROWN.

Cr. 4840.

District Court of Appeal, Second District, Division 3, California.
Oct. 30, 1952.

Defendant was convicted of forcible rape. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that admission of testimony of police officer concerning interview with prosecutrix, wherein prosecutrix, in presence of defendant, related her story in detail and defendant, at conclusion, indicated that her story was generally true, was not error.

Judgment and order affirmed.

1. Criminal Law ⚷361(3)
Rape ⚷40(1)

In prosecution for forcible rape, where prosecutrix was shown to have an infection, any evidence tending to prove absence of such infection in defendant at time of his examination after release from jail was relevant and material upon issue of prosecutrix' alleged unchastity, and, therefore, testimony that penicillin would ordinarily remove evidence of the infection within a few hours was also relevant.

2. Criminal Law ⚷1036(1)

Even if valid ground of objection exists to testimony involved, but none such ground is stated in the trial court, such error cannot be claimed for first time on appeal.

3. Criminal Law ⚷706

In prosecution for forcible rape, where cross examination of prosecutrix' physician brought out opinion that prosecutrix was suffering from an infection, and defendant's physician testified that defendant was not infected therewith, prosecutor's asking whether shot of penicillin could have prevented defendant's physician from detecting the infection in defendant did not constitute misconduct although no evidence was introduced that defendant had been given penicillin.

4. Criminal Law ⚷698(1)

In prosecution for rape, police officer's testimony concerning interview with prosecutrix and defendant, wherein prosecutrix related her story in detail and defendant indicated that prosecutrix' story was generally true, was not error or misconduct, in view of fact that testimony was given without objection or motion to strike.

5. Criminal Law ⚷941(1)

Upon motion for new trial following conviction for forcible rape, evidence that defendant had been released from jail three or four hours before being examined by his physician and, therefore, would not have had time to have taken penicillin five or six hours before the examination, and that the night watchman in the vicinity of offense had not heard any scream or automobile horn blow was cumulative and was not shown to have been newly discovered and, therefore, denial of motion was not error.

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Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant appeals from a judgment entered upon a verdict convicting him of forcible rape, and from an order denying his motion for a new trial. He admitted to the arresting officers and as a witness an act of intercourse, but steadfastly insisted it was with the consent of the prosecutrix. He does not question the sufficiency of the evidence to justify the verdict. It is therefore unnecessary to relate the evidence of the circumstances of the offense.

Defendant's principal contention is that the deputy district attorney was guilty of prejudicial misconduct in the cross examination of defendant's witness, a physician.

The prosecutrix was 23 years of age and unmarried. The day following the commission of the offense she was examined by a physician who testified for the People as to her injuries. Upon cross examination he testified that in his opinion she had recently lost her virginity and also that he found gonococci cells in sufficient number to indicate an infection. Defendant called a physician who testified he had examined defendant three days after the date of the offense and that the results were "negative for any gonococcus." Defendant had sought the examination because he had heard that he had been accused of transmitting an infection. Upon cross examination the doctor testified that if defendant had had sexual intercourse with an infected female he would not necessarily have become infected. He was asked: "And isn't it possible, Doctor, that he might have had gonorrhea at the time he had intercourse with the female a few days before and it not show up in your test on the 5th of November?" to which he answered, "No." He was then asked: "Well, now, Doctor, isn't it a fact that if a man who has gonorrhea takes one or two shots, if I might use that expression, of penicillin just before the examination, wouldn't that show negative in your test?" to which he answered, "Yes, it would. I have no evidence that he did, though." Further cross examination and redirect examination developed opinions of the witness that the administration of penicillin would normally destroy the evidence of infection in about six hours, but that there are individuals who are resistant to penicillin upon whom it would not have that effect. The doctor testified further in answer to a question by the prosecutor that as a general rule a test taken a few hours after the administration of penicillin would be negative. The question was repeated in substantially the same form and was objected to upon the ground that it had been asked and answered. The objection was overruled and the witness answered: "Yes * * * I said generally, yes."

The claim of misconduct consists of the asking of the foregoing questions by the prosecutor when there was no evidence that defendant had been given penicillin.

[1-3] It should be borne in mind that defendant introduced the entire issue. First he brought out on cross examination of the physician who examined prosecutrix the opinion that until a short time before his examination she had been a virgin, and by further cross examination he elicited the opinion that she was suffering from an infection. His theory was that the infection would invariably, or usually, be transmitted by physical contact, that he was not suffering from an infection, that he could not have transmitted it and that its existence in prosecutrix was necessarily due to some previous act of intercourse, a fact which, if proved, would be properly considered with her testimony that she did not consent. Any evidence which tended to disprove that the absence of an infection at the time he was examined established the fact that the prosecutrix was unchaste was relevant and material. Testimony that penicillin would ordinarily remove evidence of an infection within a few hours was relevant. If the questions propounded to the physician by the prosecutor were objectionable it would have been on the ground that they invaded the field of speculation in the absence of evidence that penicillin had been administered. There was no objection on that ground. The only objection was on the ground of repetition. No motion was made to strike the answers. There was no assignment of misconduct in asking the questions and no request for an admonition that the jury disregard the questions and answers. Even if some valid ground of objection could have been stated none was stated, and error cannot be claimed for the first time on appeal. It is obvious also that there is no basis for the claim of misconduct.

[4] The People introduced testimony of a police officer as to an interview with the prosecutrix and defendant in the presence of a sister of prosecutrix and another officer. In this interview prosecutrix, in the presence of the defendant, related her story in great detail, at the conclusion of which defendant said, in answer to a question by the officer whether it was true, "Well, in truth and in substance it is the same—some of it is different." The testimony was given without objection and there was no motion to strike all or any part of it. There was no assignment of misconduct. There is no merit in the claim of error and misconduct in the receipt of this testimony.

[5] In support of his motion for a new trial defendant filed two affidavits. One was by an agent of a surety company to the effect that defendant was released from jail 3 or 4 hours before he was examined by his physician. A witness for the People had testified that he was released about 11:00 or 11:30 o'clock a. m., and defendant had testified that he was released about 3:00 o'clock. This evidence was directed to the inquiry whether defendant was released in time to have taken penicillin 5 or 6 hours before his examina-

tion. In another affidavit a night watchman averred that he was in the near vicinity of the scene of the offense and that he had not heard a woman scream or heard an automobile horn blown. Evidence of these facts would have been contradictory of testimony of the prosecutrix, although defendant, himself, had testified to the blowing of the horn.

There was no error in denying the motion for a new trial. The evidence would have been cumulative and there was no showing that it was newly discovered. Denial of the motion for a new trial was not an abuse of discretion. People v. Byrne, 160 Cal. 217, 116 P. 521.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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113 Cal.App.2d 880

DOYLE v. SUPERIOR COURT OF STATE, IN AND FOR CONTRA COSTA COUNTY et al.

Civ. 15452.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1952.

Proceeding to review an order adjudging petitioner guilty of contempt in violating an injunctive order. The District Court of Appeal, Nourse, P. J., held that an alleged contemner's actual knowledge of order which he is charged to have violated is essential and must be alleged as prerequisite to contempt proceedings.

Order annulled.

1. Contempt 🔑**54(2, 4)**

In contempt proceedings, statutory provisions must be strictly followed and failure to allege all essential facts relied on is fatal. Code Civ.Proc. § 1211 et seq.

2. Contempt 🔑**23, 54(4)**

An alleged contemner's actual knowledge of court order which he is charged to have violated is essential and must be alleged as prerequisite to contempt proceedings. Code Civ.Proc. § 1211 et seq.

3. Contempt 🔑**66(7)**

In reviewing contempt proceeding, charge, evidence, findings and judgment must be strictly construed in accused's favor, and no intendments or presumptions can be indulged in aid of their sufficiency. Code Civ.Proc. § 1211 et seq.

4. Contempt 🔑**66(6)**

Where record of contempt proceedings fails to show affirmatively on its face existence of all necessary facts on which jurisdiction depended, order adjudging accused guilty of contempt must be annulled by reviewing court. Code Civ.Proc. § 1211 et seq.

5. Contempt 🔑**66(8)**

Where affidavit charging contempt in violating injunctive order did not affirmatively allege that accused was served with notice of order before alleged violation, order must be annulled by District Court of Appeal on review thereof. Code Civ. Proc. § 1211 et seq.

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Nathan G. Gray, Berkeley, for petitioner.

John A. Nejedly, Walnut Creek, for respondents.

NOURSE, Presiding Justice.

In a petition to review an order of the trial court adjudging petitioner guilty of contempt it appears that after he had been enjoined from doing certain acts he was cited to appear and show cause why he should not be adjudged in contempt because of his continued violation of the injunctive order. In his petition he alleges that the affidavit charging contempt did not affirmatively allege that, prior to the alleged violation of the injunctive order, he had been served with notice of the judgment. The respondent has appeared by demurrer only, and we are informed that the litigation has been settled. But petitioner insists upon a ruling.

[1, 2] Our decisions are uniform that the provisions of sections 1211 et seq., Code Civ.Proc. must be strictly followed and that a failure to allege all the essential facts relied on is fatal to contempt proceedings. Actual knowledge of the order which the party is charged to have violated is essential and must be alleged as a prerequisite to contempt proceedings. Phillips v. Superior Court, 22 Cal.2d 256, 137 P.2d 838.

[3, 4] In Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 75, 29 A.L.R. 127, which was also a proceeding in certiorari, the court said: "In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused (Schwarz v. Superior Court, supra [111 Cal. 106, 43 P. 580]), and no intendments or presumptions can be indulged in aid of their sufficiency. (Frowley v. Superior Court, supra [158 Cal. 220, 110 P. 817]). If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled."

[5] Order annulled.

GOODELL and DOOLING, JJ., concur.

113 Cal.App.2d 881

PEOPLE v. WHEELER.

Cr. 2344.

District Court of Appeal, Third District, California.

Oct. 29, 1952.

Defendant was convicted in the Superior Court, Stanislaus County, Sherrill Halbert, J., of robbery, and appealed. The District Court of Appeal, Van Dyke, J., held that where defendant's counsel asked him and his codefendant whether they had paid said counsel or had agreed to pay said counsel and, upon objection, explained that questions were to make clear that counsel had not received any of money from alleged robbery, questioning and remark did not indicate such intentional dereliction of duty as to require trial court to assume that counsel was being untrue to his trust and that he was exercising bad judgment in presenting his clients' cause, and to affirmatively interfere by striking the exchange and instructing the jury to disregard it.

Judgment affirmed.

1. Attorney and Client 🔑32
Criminal Law 🔑699

Attorneys representing parties at trial are entitled to present their clients' causes in their own manner, subject, of course, to general rules that govern, and courts ought to be reluctant to interfere with an attorney's method of trying his case.

2. Criminal Law 🔑699

In prosecution for robbery, where defendants' counsel asked them whether they had paid counsel or had agreed to pay counsel and, upon objection, explained that questions were to make clear that counsel had not received any of money from alleged robbery, questioning and remark did not indicate such intentional dereliction of duty as to require trial court to assume that counsel was being untrue to his trust and that he was exercising bad judgment in presenting his clients' cause, and to affirmatively interfere by striking the exchange and instructing the jury to disregard it.

Jesse E. Fluharty, Sacramento, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

By information appellant Lacy Garland Wheeler and his codefendant were charged with robbing one Joe Ybarra of $360 in currency and a knife valued at $5. After a trial a jury brought in a verdict finding both defendants guilty of robbery of the second degree. From the judgment and the order denying a new trial Lacy Garland Wheeler alone has appealed, and he prosecutes his appeal through counsel other than the counsel who represented him at the trial.

There was testimony that after the three men had engaged in a card game in Modesto they entered a truck belonging to the Wheelers and drove out on the highway a short way from town where Mr. Ybarra was to get out and go to his home; that appellant asked him for $2 as fare for transporting him to that point and when Ybarra protested appellant struck him, knocking him down; that he continued to pummel him while his codefendant went through his pockets and abstracted the money and the knife. Appellant and his codefendant gave a different version. Appellant testified that Ybarra, after protesting the fare, drew a knife, whereupon appellant pushed him so that he fell. He then took the knife to prevent Ybarra from injuring him and he and his codefendant left the scene. There was evidence that Ybarra showed the effects of a beating and that there was blood at the scene of the scuffle. The foregoing shows that the evidence was in conflict and it is not argued that the verdict is not substantially supported.

The sole contention advanced for reversal revolves around the following incident occurring at the trial: Appellant's counsel, while appellant was on the stand testifying in his own behalf, asked him this question, "Have you paid me any money directly or indirectly?" Appellant replied that he had not. Later, when his codefendant was on the stand testifying in his own behalf, the same counsel who represented both men asked the following question: "I forgot to ask you a question I asked Lacy Wheeler. Have you paid me any money directly or indirectly?" The witness replied that he had not. He was then asked if he had made an agreement to pay him anything, at which point the prosecuting attorney objected on the ground that the evidence sought to be elicited was incompetent, irrelevant and immaterial. Appellant's counsel thereupon said: "Merely a matter of personal knowledge. I don't want the jury to think I got this $360.00." The court sustained the objection.

[1] It is argued that as a result of the asking of the questions concerning payment, the remark made by appellant's counsel, and the failure of the trial judge to take affirmative action, though action was not requested by either counsel, to strike out the questions, answers and the remark of counsel and instruct the jury to disregard the same, a fair trial was denied to appellant. We do not agree. Counsel's reference is to such cases as Dastagir v. Dastagir, 109 Cal.App.2d 809, 241 P.2d 656; People v. McDaniel, 59 Cal.App.2d 672, 140 P.2d 88; People v. Yuen, 32 Cal.App.2d 151, 89 P.2d 438, 90 P.2d 291 and other cases, wherein it is declared that a trial judge does not sit as a mere arbitrator between opposing counsel, but is under the affirmative duty to see that errors or extraneous matters are not brought into the case that might have the effect of clouding the issue or confusing the jury and that when improper questions are asked the court is acting within the proper scope of its duty in striking out the offending question whether or not objection had been previously made thereto. People v. Yuen, supra. Here the questions deemed objectionable were asked by appellant's own counsel and the remark deemed derogatory to appellant's interests was made by his counsel. Attorneys representing parties at a trial perform highly important functions and on the whole are of right entitled to present their clients' causes in their own manner, subject, of course, to the general rules that govern. Generally speaking, courts are and ought to be reluctant to interfere with an attorney's method of trying his case or to sit in judgment on what the attorney believes will benefit his client so far as the method of trial be concerned, and again subject to the governing rules. Attorneys may justly resent a trial judge's attempt to compel an attorney to try his case as the judge thinks he would try it if he were an advocate. We have read the record of the trial in this case and throughout it appears that appellant's counsel zealously presented the facts favorable to appellant's case and argued in his behalf that he was innocent of the crime charged.

[2] Specifically with reference to the gratuitous remark interjected by appellant's counsel, its effect depends greatly upon the mien and manner of counsel. Generally, as here, such matters are not reflected in the record. Hence we cannot say that by the remark he made appellant's counsel was in any sense betraying his client's interests or making damaging admissions. Appellant says that his counsel was intimating to the jury that he thought appellant was guilty and counsel was only doing his duty in defending him, but "did not want his fellow citizens to think that he received any of the alleged loot." We do not think that from this record it can be said counsel's conduct must bear the interpretation that appellant seeks to put upon it. As we have said, his counsel's attitude and conduct throughout the trial appears from the record to have been that of a counsel endeavoring as best he could to present his client's cause favorably to those who had to pass upon his guilt or innocence. We might, as appellant does, question his good judgment in asking the questions he asked and in making the remark he made, but from the record we certainly cannot say that he was guilty of intentional dereliction of duty. Under the circumstances presented we think the trial court was not called upon to, first, assume that counsel was being untrue to his trust; second, that he was exercising bad judgment in the way in which he was presenting his client's cause; and, third, to affirmatively interfere by striking what the court deemed to be offensive matter from the record and instructing the jury to disregard the same. It is to be remembered that the trial court did sustain the only objection made and thus terminated the episode. In addition, he instructed the jury that whenever testimony had been rejected by the court they were to disregard the same wholly.

Under all the circumstances as shown by the record we think the judgment and the order should be and they are hereby affirmed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

BETTELHEIM v. HAGSTROM FOOD STORES, Inc.

No. 15313.

District Court of Appeal, First District, Division 1, California.

Oct. 29, 1952.

Rehearing Denied Nov. 28, 1952.

Hearing Denied Dec. 22, 1952.

Action by former landlord against former business tenant for additional rentals due under terms of lease providing therefor in case of holding over. The Superior Court, County of Alameda, Chris B. Fox, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Bray, J., held, inter alia, that since the landlord had accepted the usual rentals from the tenant after termination of the lease knowing that the tenant assumed such rentals to be full payment, landlord was estopped from claiming additional rentals under the lease.

Affirmed.

1. Appeal and Error ⚷931(1)

Court of Appeal would be required to consider evidence and all reasonable inferences therefrom most strongly in favor of trial court's findings.

2. Landlord and Tenant ⚷115(3)

In action by landlord against former tenant for penalty rentals due under lease for holding over, evidence was insufficient to support trial court's finding that tenant had occupied the premises after termination of the lease pursuant to a month to month tenancy arrived at by an oral agreement which was fully executed.

3. Principal and Agent ⚷48

Agent of landlord authorized to negotiate new lease with tenant had duty to convey to landlord statements made by the tenant. Civ.Code, § 2332.

4. Principal and Agent ⚷177(3)

Where commercial tenant made it clear to landlord's agent that he would not enter into new lease and would only remain in possession under the same rental terms as existed under expired lease, landlord, when he accepted each month sums which were only two per cent of tenant's gross sales, as provided by the lease, and not five per cent as set forth in penalty clause for holding over, was chargeable with knowledge that tenant was unwilling to stay in possession on any other basis than a two per cent rental. Civ.Code, § 2332.

5. Evidence 🔑66

Where monthly rental checks received by landlord from business tenant, who was holding over, were approximately the same as those received during the life of the lease, landlord would be charged with knowing that he was receiving the same percentage of gross sales as under the lease, rather than twice as much as provided under lease in case of holding over.

6. Estoppel 🔑52

"Waiver" is the intentional relinquishment of a known right after knowledge of the facts.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

7. Contracts 🔑316(1)

Waiver clause requiring waiver of conditions and terms of contract to be in writing may be waived by conduct.

8. Landlord and Tenant 🔑216

Where business tenant held over during lease negotiations and landlord accepted usual rentals knowing that tenant was paying them on assumption that they were full payment, landlord waived penalty clause of expired lease providing for increased rentals in case of holding over, though lease required that waiver of terms and conditions be in writing.

9. Appeal and Error 🔑1008(1)

Where conclusion of trial court was permissible under the facts, Court of Appeal would be bound by such conclusion.

10. Contracts 🔑316(1)

A party to a contract may by conduct or representations waive performance of a condition thereof or be held estopped by such conduct or representations from denying that he has waived such performance.

11. Estoppel 🔑95

An estoppel may arise from silence as well as from words or conduct, but only where there is a duty to speak and the party upon whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent.

12. Estoppel 🔑95

The circumstances attending the entire transaction must be such as to make it reasonably probable that the person seeking to set up estoppel because of another's silence has suffered prejudice by the other's unreasonable acquiescence.

13. Landlord and Tenant 🔑200(3)

Where landlord during negotiations for lease accepted for eight months usual rentals from hold-over tenant without protest, though he knew tenant assumed rentals to be full payment, landlord was estopped from claiming additional rentals under terms of original lease providing therefor in case of holding over.

◆

Nathan G. Gray, Berkeley, for appellant.

Koford, Kitchel & Koford, Oakland, for respondents.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendant, in an action to recover, under the terms of a lease, penalty rentals for holding over.

Questions Presented.

Sufficiency of the evidence to support findings as to (1) an executed oral agreement, (2) waiver and estoppel.

Facts.

The facts are practically undisputed. It is the inferences and conclusions therefrom that are disputed. The following are the facts: Defendant owns a chain of stores. For many years, under leases from various owners, it occupied the premises in question. In December, 1946, plaintiff then holding a master lease of the premises, entered into a three-year sublease with defendant, the term running from May 15, 1947, to May 14, 1950. In May, 1947, plaintiff obtained from the owner of the premises a new ten-year lease. The sublease required defendant to pay a rental of 2 per cent of the gross receipts, with a minimum monthly rental of $500. During the three-year period the rental was paid each month in two checks, one for $500 and an additional one for the balance necessary to equal 2 per cent of the previous monthly gross. Attached to these additional checks was a statement showing the previous month's gross sales and the computation of 2 per cent thereof.

The last check sent in prior to the expiration of the lease, that dated May 11, did not show the gross sales of the previous month, but merely the words "additional rent." Thereafter and during the entire holding over period the additional check each month bore this same legend. About a month before the lease expired one Dodge contacted Hagstrom, defendant's president, and stated he was authorized by plaintiff to negotiate a new lease with defendant. Plaintiff testified that he had authorized Dodge to negotiate a new lease with defendant or any other person. Dodge told Hagstrom that plaintiff was anxious and willing to make a new lease. Thereupon Hagstrom replied, "I told him, no, we were not interested in a lease at all, but we would be willing to stay under the same terms and conditions that we had been under in the past years." To this Dodge replied that plaintiff was mainly interested in getting defendant to take over either a portion or all of the time left in the master lease; that plaintiff was interested in keeping defendant as a tenant as it was a good tenant. There were at least four conversations between Dodge and Hagstrom on the subject. When asked concerning the other three conversations Hagstrom testified, "The same thing right along on each one of these." On one of Dodge's visits he gave Hagstrom a copy of the master lease. In the meantime the term of the lease had expired, and defendant remained in possession, sending plaintiff each month checks totaling 2 per cent of the previous month's gross receipts. Sometime in December, which was during the seventh month of the holding over, Hagstrom had a phone conversation with plaintiff. Hagstrom testified that plaintiff phoned him and said that Dodge, his agent, had called on Hagstrom several times but had been unable to "make a deal" and plaintiff thought that by calling Hagstrom direct he and Hagstrom could get together. Hagstrom then told plaintiff the same thing he had told Dodge, that on account of parking conditions defendant was not interested in a long term lease. Plaintiff was not asked concerning this conversation other than whether in it he had suggested to Hagstrom that defendant take over the master lease. He stated he did. Shortly after this conversation Dodge delivered to defendant a notice to quit by January 14, 1951. This notice was signed by plaintiff and among other things stated that he was sorry to lose defendant as a tenant, but "I feel that I should have a firm lease and this you were unwilling to give." Defendant surrendered possession as notified. At no time during the eight months period of holding over did either Dodge or plaintiff claim the penalty rental provided in the lease. Nor was it mentioned in the notice to quit, although in that notice it was stated that if defendant stayed beyond January 14 the rental would be $100 per day.

Plaintiff sued for the difference between 2 per cent and 5 per cent of the gross receipts for the eight months period. The lease contained a provision that any holding over would be deemed merely a tenancy from month to month at a monthly rental of "no less than an amount equal to five (5) per cent of said 'gross receipts,' with a minimum rental of Five Hundred Dollars ($500)."

Sufficiency of Evidence.

1. *Executed Oral Agreement.*

[1, 2] The court found that during the period of the holding over, defendant occupied the premises "pursuant to a month to month tenancy arrived at by an oral agreement between plaintiff and defendant, which was fully executed."

We are required to consider the evidence and all reasonable inferences therefrom most strongly in favor of the findings. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. Even doing so, we can find no support for the finding that there was an executed oral agreement. The testimony as to the conversations between Dodge and

Hagstrom and the latter and plaintiff is very sketchy. While defendant admitted that Dodge was his agent for the purpose of negotiating a new lease, it is doubtful if Dodge's authority authorized him to agree to a modification of the old lease, or to a new month to month tenancy. However, it is unnecessary to discuss the extent of Dodge's authority in this respect, as, even assuming that he had such authority, we are unable to spell out from the discussion of Hagstrom with either Dodge or plaintiff any agreement of any kind, either express or implied. Both Dodge and plaintiff were asking for a lease. Hagstrom was asking to be permitted to stay under the previous terms and conditions. They were still discussing the same matters when the notice to quit was given. Neither Dodge nor plaintiff agreed, either directly or indirectly, to let defendant continue on under the old terms. The most that was done in this respect was to acquiesce in its remaining in possession without any agreement as to terms. However, the insufficiency of the evidence to support this finding does not entitle plaintiff to a reversal of the judgment for the reason that the evidence does support other findings.

2. *Waiver and Estoppel.*

[3-5] The court found that during the holding over period, defendant paid 2 per cent of the gross receipts, "that plaintiff accepted said payments with full knowledge of the manner in which they were computed and at no time prior to the filing of this suit raised any question as to the sufficiency or correctness of the amounts of said payments or any of them; that plaintiff's acquiescence in defendant's continued occupancy of the premises upon the two per cent basis of the prior term, induced defendant to remain in said premises until January 14, 1951" and by reason of those facts and circumstances plaintiff is estopped from asserting any claim for rentals in excess of the amounts received. In the conversations with both Dodge and plaintiff Hagstrom made it clear that defendant would not enter into a new lease and would only remain in possession under the same terms as they had been paying. As pointed out above, it may be assumed that Dodge had no authority to agree to such terms. Still Dodge admittedly had authority to negotiate a new lease and the statements made to him by Hagstrom he was in duty bound to convey to his principal. That he did is clearly shown by plaintiff's testimony that from time to time he talked to Dodge "with regard to what he was doing." "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Civ.Code, § 2332. Thus, plaintiff, when he accepted each month sums which were only 2 per cent of the gross (and not 5 per cent as set forth in the penalty clause), knew that defendant was unwilling to stay in the premises on any other basis than a 2 per cent rental. From what Hagstrom told Dodge, which Dodge conveyed or should have conveyed to his principal, the trial court undoubtedly inferred that plaintiff knew that defendant was staying on because it believed it was only being required to pay the 2 per cent. Such an inference is logical and reasonable. It is argued that plaintiff might not have known he was getting only 2 per cent. Plaintiff did not so testify, nor did he testify that in receiving the monthly rentals of only 2 per cent, he thought the other 3 per cent was to be paid later. The total monthly checks during the holding over period as compared with those in evidence during approximately eight months preceding, show that the returns were approximately the same, so much so that it is idle to claim that the person receiving them did not know that the percentage was the same as before nor that he was not receiving two and a half times what he received before. Nor can it reasonably be claimed that plaintiff was misled by the change in the legends on the checks. Prior to the expiration of the lease plaintiff had received at least one check without the 2 per cent notation and the very amounts of the checks subsequently received were notice to him that he was not receiving 5 per cent.

The lease contains a provision to the effect that within 10 days after the expiration of each month lessee shall deliver lessor a written statement showing gross receipts, itemizing certain matters. Then "no acceptance of any of said written statements or of percentage rental paid thereunder shall constitute an admission of their accuracy, but Lessor may at any time during, or within two (2) years after the expiration of, the term of this lease enforce any payments due him hereunder." "Twelfth. No waiver by Lessor at any time of any of the terms, conditions, covenants or agreements of this lease shall be deemed or taken unless in writing and signed by Lessor, nor as a waiver at any time thereafter * * * nor of the strict and prompt performance thereof by Lessee. No delay, failure or omission of the Lessor to re-enter the demised premises or to exercise any right, power, privilege or option arising from any default, nor subsequent acceptance of rent then or thereafter accrued, shall impair any such right, power, privilege or option, or be construed to be a waiver of any such default or relinquishment thereof, or acquiescence therein * * *."

[6-13] "Waiver is the intentional relinquishment of a known right after knowledge of the facts." Roesch v. De Mota, 24 Cal.2d 563, 572, 150 P.2d 422, 426. Here, as pointed out above, a logical and reasonable conclusion from the evidence is that plaintiff knew the facts and accepted the rentals with full knowledge that defendant was paying them assuming them to be in full payment. Even a waiver clause may be waived by conduct. That was done here. While a contrary conclusion might have been drawn, such a conclusion is not inevitable or the only reasonable one. In such event we are bound by the conclusion drawn by the trial court. Too, the circumstances as found, in effect, by the trial court cry aloud for the application of the doctrine of estoppel. Plaintiff received rental for eight months longer than he would have received had he not by his conduct misled defendant into thinking the old rental applied. Apparently plaintiff had no tenant to enter during that period as during it all he was endeavoring to get defendant to remain. On the other hand, to apply the penalty would be to inflict a tremendous financial burden on defendant, who, under the circumstances, was justified in concluding that its old rental was being accepted." "* * * a party to a contract may by conduct or representations waive the performance of a condition thereof or be held estopped by such conduct or representations to deny that he has waived such performance." Panno v. Russo, 82 Cal.App.2d 408, 412, 186 P.2d 452, 454. Hacker, etc., Co. v. Chapman V. Mfg. Co., 17 Cal.App.2d 265, 61 P.2d 944, and Pitt v. Mallalieu, 85 Cal.App.2d 77, 192 P.2d 24, cited by plaintiff, do not apply for the reason that in each of them the evidence failed to disclose knowledge on the part of the one who was claimed to have waived his rights. The language of C. I. T. Corporation v. Hawley, 34 Cal.App.2d 66, at page 72, 93 P.2d 216, at page 219, is applicable here; "An estoppel may arise from silence as well as from words or conduct. But this is only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent. *The circumstances attending the entire transaction must be such as to make it reasonably probable that the person seeking to set up the estoppel has suffered prejudice by the other's unreasonable acquiescence.*" (Emphasis added.) See also Wold v. League of the Cross, etc., 114 Cal.App. 474, 300 P. 57. The facts of both of those cases are different than in ours, and in nowise comparable, but the principle enunciated applies here. In Julian v. Gold, 214 Cal. 74, at page 80, 3 P.2d 1009, at page 1011, the court after quoting section 2076, Code of Civil Procedure, said: "Under this section, if the lessor was unwilling to accept the amount tendered as in full, he could have protested then, but his acceptance, as in full payment, of a lesser sum than that due, brings him within the rule of estoppel declared by the above section." In our case, this is so because in spite of any interpretation which may be given to the so-called nonwaiver clauses of the lease, plaintiff knew that the monthly rentals were offered as full payment. Here the estoppel is not based on silence alone but

on conduct inconsistent with a reliance upon the strict terms of the lease.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

113 Cal.App.2d 899

In re NOONAN'S ESTATE.
MURPHY et al. v. KATZ et al.
Civ. 15503.

District Court of Appeal, First District,
Division 2, California.
Oct. 30, 1952.

Proceeding in the matter of the estate of a decedent. After the reporter's certified transcript was transmitted to the Appellate Court, appellants moved for settlement and certification of a proposed statement for use on appeal in lieu of the transcript. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., denied the request, and appellants appealed from such order. Respondents moved to dismiss the appeal and the District Court of Appeal, Dooling, J., held that with the single exception of appeal from orders granting motions for new trial, no appeal would lie from any order in probate not specified in the Probate Code.

Motion to dismiss appeal granted.

1. Wills 🔑358

With the single exception of appeals from orders granting motions for new trial, no appeal will lie from any order in probate not specified in the Probate Code, and, thus, appeal from order in probate denying settlement and certification of a statement of the evidence for use on appeal in lieu of reporter's transcript would be dismissed. Probate Code, § 1240.

2. Appeal and Error 🔑82(1)
Wills 🔑358

Although special orders made after final judgment are appealable in civil actions under Code of Civil Procedure, they are nonappealable if made in probate. Code Civ.Proc. §§ 473, 963, subd. 2.

Andrew F. Burke, San Francisco, for appellants.

Lamson, Jordan & Walsh, San Francisco, for respondents.

DOOLING, Justice.

Respondents move to dismiss an appeal from an order entered on November 8, 1951 denying a petition for the settlement and certification of a statement of the evidence for use on appeal in lieu of a reporter's transcript.

The clerk's certificate shows that in a proceeding to administer the estate of one Noonan, deceased, a decree of final distribution was entered and appellants filed a notice of appeal therefrom. In proper time appellants filed a notice and request for a reporter's transcript "including therein the statement that they intended to proceed by settled statement in the event that the hearing on the settlement of the account and the petition for final distribution had not been reported or that the reporter's transcript could not be prepared and filed within the time required by law." On September 6, 1951 notice of completion of a reporter's transcript was given to counsel, no request for correction was filed as provided by rule 8(a), Rules on Appeal and the reporter's certified transcript has been transmitted to the clerk of this court.

On September 18, 1951 appellants filed a proposed statement of evidence on appeal and a request for settlement and certification of this statement for use on appeal in lieu of the reporter's transcript. The petition for settlement and certification of this proposed statement was denied on November 8, 1951 and notice of appeal from this order of November 8 was filed on January 7, 1952. It is this appeal which respondents move to dismiss. The motion is made on the ground that an order refusing to settle a record on appeal is not included in the orders in probate proceedings from which an appeal is authorized to be taken by section 1240, Probate Code.

[1] It must be taken as thoroughly settled that, with the single exception of appeals from orders granting motions for new trial, which exception traces back to In re Bauquier, 88 Cal. 302, 26 P. 178, 532, no appeal will lie from any order in probate not specified in Prob.Code, sec. 1240. See Estate of Hart, 92 Cal.App.2d 691, 208 P.2d 59, where the history of this rule is traced and the cases assembled.

[2] In Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922, 923, the court held that in civil actions an appeal will lie from an order terminating proceedings for a record on appeal under subdivision 2 of section 963 Code of Civil Procedure which authorizes an appeal from "any special order made after final judgment." But while special orders made after final judgment are appealable in civil actions under sec. 963, subd. 2, Code Civ.Proc. they have uniformly been held nonappealable if made in probate. Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368; Estate of Allen, 175 Cal. 356, 165 P. 1011; Estate of Spafford, 175 Cal. 52, 165 P. 1; Estate of Cahill, 142 Cal. 628, 76 P. 383; Estate of Hart, supra, 92 Cal.App.2d at page 695, 208 P.2d 59; Estate of Ryker, 92 Cal.App.2d 162, 206 P.2d 406.

In Estate of Allen, supra, the court held that an order denying a motion under sec. 473, Code Civ.Proc. for relief from default in the preparation of a transcript to be used on appeal from a probate order is not appealable. The court said, 175 Cal. 375, 165 P. at page 1011, "The provision of subdivision that an appeal may be taken from a special order made after final judgment has no application to probate proceedings."

Appellants ask us to reexamine the rule and make various arguments against its application to this appeal. In view of the fact that we feel bound by the decisions of the Supreme Court in this field we refrain from discussing these arguments. Any change in the rule must come from the legislature or the Supreme Court. We need not speculate in this proceeding whether any avenue to this court other than appeal is open to appellants.

The motion to dismiss the appeal is granted.

NOURSE, P. J., and GOODELL, J., concur.

113 Cal.App.2d 842

PEOPLE v. RAMIREZ.

Cr. 4797.

District Court of Appeal, Second District,
Division 1, California.
Oct. 27, 1952.

Rehearing Denied Nov. 7, 1952.
Hearing Denied Nov. 25, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of a violation of the narcotics law, and she appealed. The District Court of Appeal, Doran, J., held that the court's comment exonerating a state's witness from complicity was a comment upon such witness' credibility and was prejudicial to defendant.

Reversed and remanded.

1. Criminal Law 🔑1169(2)

In prosecution for violation of narcotics law, error in admitting officer's testimony as to conversation with witness, not in defendant's presence, relative to narcotics was not prejudicial, in view of fact that witness subsequently testified the same as the officer.

2. Criminal Law 🔑656(5), 1166½(12)

Remarks of trial court in prosecution for violation of narcotics law exonerating state's witness from complicity was an invasion of jury's province in that it was a comment on witness' credibility, and, along with other remarks and conduct, prejudiced defendant. Penal Code, § 1111, Health and Safety Code, § 11500.

3. Witnesses ⚷246(2)

The judge has the right, in criminal prosecution, to interrogate witnesses, but he has no right to usurp the place of state's attorney or the place of prisoner's counsel, but he may ask questions which the attorneys had right to propound and failed to ask, when answers thereto may tend to prove guilt or innocence.

4. Criminal Law ⚷656(5)

Trial judge in criminal action should not express or intimate an opinion as to credibility of a witness, or as to controverted facts, such matters being for the jury.

5. Criminal Law ⚷780(1)

Where it appeared in prosecution for violation of narcotics law that state's witness had been party to transaction upon which prosecution was based, it was court's duty to instruct fully on the law relating to testimony of an accomplice.

6. Criminal Law ⚷769

It is incumbent upon a court in criminal case to instruct jury of its own motion charging them fully and fairly upon the law relating to the facts of the case.

◆

Umann & Bubrick, Sam Bubrick, Harry M. Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The sole contention on appeal is that, "The defendant's rights were substantially prejudiced by the comments of the trial judge in the presence of the jury".

Defendant was adjudged guilty by a jury of selling a preparation of heroin in violation of section 11500 of the Health and Safety Code.

The facts and trial errors, as they appear in the reporter's transcript, are as follows: A state narcotic enforcement officer, Mr. O'Connor, and an investigator from the district attorney's office were checking an area known as Hicks Camp in El Monte. Both officers were in plain clothes and using a county car. "They observed one Leiva near the intersection" of two streets and stopped the car. O'Connor testified, quoting from the reporter's transcript:

> "Q. Now, at that time that you met Leiva, did you have a conversation with him relative to narcotics? A. Yes, sir, I did.
>
> "Q. What was said, and by whom?
>
> "Mr. Umann: To which we object, your Honor, no proper foundation having been laid, defendant not being present, hearsay.
>
> "The Court: You dropped your voice there when you said 'defendant', I didn't hear it.
>
> "Mr. Umann: Sir?
>
> "The Court: You dropped your voice when you said 'defendant'.
>
> "Mr. Umann: Defendant not being present, your Honor.
>
> "The Court: I don't know of any rule that requires defendant to be present at a conversation in order to make it admissible.
>
> "Mr. Umann: Conversation as to this defendant between the officer and a third party?
>
> "The Court: The conversation may be admissible, although defendant isn't present.
>
> "Mr. Umann: There is no conversation with this defendant.
>
> "The Court: Not offering to prove a conversation with the defendant, offering to prove a conversation with the witness Leiva.
>
> "Mr. Umann: Your Honor, that would be hearsay as to this defendant."

[1] The ruling was error but resulted in no prejudice for Leiva later testified the same as the officer. O'Connor testified further:

> "A. I observed Mr. Leiva on the street. We stopped the vehicle we were in, and I asked him, Mr. Leiva, if he knew the whereabouts of a Rue-

> ben Cruz, and he shook his head, indicating no. He walked over to the car. I then told Mr. Leiva that I had met Mr. Cruz earlier in that area and that I had purchased some marijuana from him, and I asked him if he knew the whereabouts of Mr. Cruz's partner; and he stated that he did not, but that there was some narcotics in that area, stated that 'You will find it around here.' I then asked him what else was in the area, and he stated that there was some 'cardigan' around."

"Cardigan" means heroin. Eliminating other details of the conversation for the sake of brevity, O'Connor continued, "I then asked Mr. Leiva if he wanted to go over and see if this party was home. He stated he was on his way home, but that he would take us over there. He entered the back of the vehicle, seated himself in the back seat, and we drove to the defendant's home."

They then drove to defendant's home which was about five miles from where the officers met Leiva. O'Connor gave Leiva three five-dollar bills and a ten. The officers had the numbers of the bills for identification. The arrangement between Leiva and the officer was that Leiva was to purchase heroin from the defendant. Officer O'Connor continued, referring to Leiva, "He got out of the vehicle and walked down a dirt alley to this link wire fence which he indicated. He opened the rear gate and stepped inside, and then I saw him walk around the left side of the house towards the front. He was getting out of my direct sight, so I asked Investigator Walker to turn the car around headed in the other direction, in the same direction Mr. Leiva was walking in. I then got out of the car and walked in the direction of the rear gate. At approximately 50 or 60 feet from the fence, I saw Mr. Leiva return from the front of the house, still inside the wire fencing, but walking between the fence and the house, walk back to the rear gate, come out; I then walked over to Mr. Walker, joined him, and we were joined by Mr. Leiva, who again entered the rear seat." Leiva returned with the heroin and was immediately placed under arrest. The officers then went to defendant's home. Defendant meanwhile had gone to the store with her two children to buy some candy. Returning in fifteen or twenty minutes the officers placed defendant under arrest. The home was searched but no narcotics found. Defendant had a five-dollar bill which was one that had been given to Leiva. The rest of the money was never found either on Leiva or the defendant or at the store visited by defendant.

On cross-examination, Officer O'Connor testified in part about defendant's arrest:

> "Q. And she denied that she had any narcotics, didn't she? A. Yes, she did.
>
> "Q. And she denied that she made any sale to anybody, didn't she? A. That is correct, yes, sir.
>
> "Q. And you told her that she gave Leiva the exhibit, the bindle, and she said, 'You did not see me give it to him,' isn't that true? A. I told the defendant that I saw her give Leiva the exhibit, and I also told her that the other officer saw her give him the exhibit.
>
> "Q. Actually that wasn't true, was it? A. That is true.
>
> "Q. True—true, that you were lying? A. I did not see her—I told her I did, but I did not.
>
> "Q. I see. And she says, 'You did not see me,' is that right? A. She asked me when, and I told her when she went in the front door of the house, and she says, 'No, you didn't.'"

Leiva who, as noted above, testified for the prosecution, was taken to defendant's house at the time of the arrest. Officer O'Connor testified as follows with relation to this incident:

> "Q. Did you ever tell Leiva, 'Don't take the blame for this beef, it's hers,' or words to that effect? Did you ever say anything like that? A. Not words to that effect. I did make a statement to Mr. Leiva, though.
>
> "Q. Oh, you did make a statement to him? A. Yes, sir, I did.

> "Q. Did you tell him not to take the blame for this? A. I said, 'You have got no business taking the blame for what she did.'
>
> "Q. When did that conversation take place? A. Before I brought Mr. Leiva to the defendant's home.
>
> "Q. Yet you arrested him at the same time, didn't you? A. I arrested him before that, yes, sir.
>
> "Q. You arrested him, and you didn't release him yet? A. That is correct, yes, sir.
>
> "Q. Even though you made the statement that he shouldn't take the blame, you still booked him and recommended $25.00 bail, didn't you? A. I didn't recommend any bail at all.
>
> "Q. All right, you still booked him? A. I booked him, yes, sir."

Leiva was taken to defendant's home at the time of the arrest and with relation to this incident Officer O'Connor testified:

> "A. I asked the defendant if this was the person she knew as Cuero, and she stated that it was, and that she had received $5.00 from him earlier that evening and had given him five $1.00 bills in change for that. Mr. Leiva then explained, 'They saw everything, there is no sense of denying it.' And the defendant stated, 'They did not see me give it to you.'"

Leiva also testified:

> "Q. How come you went along with the officers on this deal to buy some heroin for them, in other words, why did you agree to act as go-between? A. Just figure I was probably making something, I would make something out of it."

The officers denied any pre-arrangement with Leiva relating to the defendant's arrest or Leiva's testimony.

The record reveals that Leiva was an ex-convict; had been convicted of selling marijuana and had served a term therefor in the penitentiary and was on parole at all times herein mentioned.

The record also reveals that a complaint was also filed against Leiva at the same time the complaint in the within action was filed. Leiva was held to answer, and the information filed; the trial was set for a week or so after the trial of the defendant herein. At the trial of the within action efforts were made by the defense to show that concessions were made by the prosecution in consideration for Leiva's testimony against defendant herein. For example, Leiva's bail was reduced and in that connection defendant's counsel, referring to that occasion, inquired of Leiva:

> "Q. Did you make the following statement at that time, when your bail was raised in Department 41, October 15, 1951, to the Court, after your bail was raised, 'Your Honor, but I wish I could—the District Attorney's office is the one that tried to help me out because they got the facts on this case. The facts are—I guess I shouldn't—is it right for me to talk about the case now?' Did you make that statement in court? A. I can't say that I did."

Further cross-examination on the subject finally brought out the answer:

> "A. It could have been, but I mean I don't see it right here, could have been I did; I can't remember exactly."

The defendant testified and denied the sale and with relation to the incident testified as follows:

> "Direct Examination
>
> "By Mr. Umann:
>
> "Q. Nellie, have you ever been convicted of any offense before?
>
> "Mr. Breslin: I object.
>
> "The Court: Objection sustained. You can't impeach your own witness when she hasn't even testified yet.
>
> "Mr. Umann: I'm not trying to impeach her, sir.
>
> "The Court: That's an impeaching question. If it's intended to prove character, there's only one way of proving character, and that's by general reputation.
>
> "Q. By Mr. Umann: Where do you live? A. I live at 702 East Mission Drive, San Gabriel, California.

"Q. Whom do you live there with? A. By myself.

"Q. You have some children, have you? A. I have two small children.

"Q. And, Mrs. Ramirez, on the 19th, I believe it is, of September, do you remember that occasion when you were arrested? A. Yes, sir.

"Q. Now, just prior to the time you were arrested, did you see the witness, Leiva, before you were arrested that day? A. Yes.

"Q. Now, about what time was it? A. Well, I couldn't tell you at the present, but I know that it was getting after supper time. I was looking out of the back window, and I seen Mr. Leiva—I seen somebody out in the back yard, and I thought it was the rag man so I went through the front door, through the right-hand side, and he was there. Then he said, 'Hello, Nellie.' I says, 'Hello.' Then he hesitated a minute, and he says, 'Could you change me a $5.00 bill?' I says, 'I haven't got the money, but if you come inside I'll give it to you.' Then he came inside through the right-hand side, and I gave him five ones, and then he told me, 'Is Johnnie still mad at me?' I told him, 'No, he's not.' Then he says, 'All right.' Then he left through the front door to my right-hand side."

Referring to the empty capsules which the officers found in the house defendant testified as follows:

"Q. All right, now, you saw the package there with the medicinal capsules? A. Yes, sir.

"Q. That was introduced here? A. Yes, sir.

"Q. And the officer said that he found them in the lamp, in the top of the lamp? A. Yes, sir.

"Q. About how high is that lamp? A. Oh, medium height.

"Q. Well, how high would you say medium was? Was it an ordinary floor lamp? A. Yes, sir.

"Q. Now, did you put them there? A. Yes, I did.

"Q. Why did you put them there? A. Because earlier in the day I had given my daughter a capsule. She doesn't like to drink aspirins in the form of an aspirin so I smashed it and put it in a capsule.

"Q. All right, and then what did you do? A. I gave it to her, and I left it on the table. Then my little boy was playing with them so I took it away from him, and I put it in the lamp shade.

"Q. That was permanently or temporarily? A. No, just temporary. It was close by me. I was cleaning the house."

The foregoing constitutes the evidence against the defendant at the conclusion of the trial when the court adjourned until the next day for the arguments.

The next morning the record discloses the following:

"Mr. Breslin: At this time, may the Court please, in the light of something that developed last night after the Court recessed, the People move to reopen the case at this time so that the jury can have the benefit of new evidence.

"Mr. Umann: May we approach the bench, your Honor?

"The Court: Yes.

"(Whereupon, the following proceedings were had at the bench, outside the hearing of the jury:)

"Mr. Umann: It is my understanding, your Honor, that a matter may be reopened after argument for new evidence, or evidence that diligent search failed to—

"The Court: Or newly discovered evidence.

"Mr. Umann: Or newly discovered evidence. It is my contention, your Honor, that this is not newly discovered evidence.

"The Court: I don't think you know what the facts of the situation are. For the purpose of the record, what actually happened yesterday when the defendant testified—

"Mr. Umann: If your Honor please, I will request the Court to keep the voice down.

"The Court: When the defendant testified that she had these capsules to use for the purpose of giving aspirin to her daughter, who didn't like to take aspirin in its regular form, and that she crushed an aspirin tablet and put it in these capsules whenever there was an occasion for giving aspirin to the child, I immediately realized that there was sometheing rather doubtful about that testimony because of the size of the capsule, and because of the size of an aspirin tablet; so I took an aspirin tablet and crushed it and also got the exhibit, the capsules, and it is quite obvious that it would take at least five capsules to hold a crushed up aspirin tablet. In dumping the capsules out of the box, we observed, Mr. Breslin was there, we observed that two of those capsules had been used and contained a small quantity of a whitish powder.

"Mr. Umann: But, your Honor, my point is—

"The Court: Wait a minute, let me finish the statement.

"Mr. Umann: All right.

"The Court: I then thought it was of extreme importance to determine what that whitish powder was, in view of the fact that the defendant was thoroughly tied herself up with these capsules. I felt that if it were aspirin that was in the capsule, that it would corroborate the defendant; on the other hand, that it might be something else. So I directed the clerk, and I authorized him to turn over the capsules to Jay A. Allen, the police department chemist, with a request from me that he make an analysis of the contents to determine what the white powder in the capsules was. Mr. Allen came over this morning, and the capsules were delivered to him, and he made an analysis, and finds that the contents of the capsules is heroin, a fact which was wholly unknown up until this morning.

"Mr. Umann: Well, your Honor, I believe that the testimony shows that I asked that question direct of Inspector O'Connor, and he stated there was no narcotics there.

"The Court: Yes, but he didn't know.

"Mr. Umann: My point is, this is not new evidence. I referred to the capsules specifically.

"The Court: You didn't ask him whether he examined the contents of the empty capsules.

"Mr. Umann: I asked him if he examined them. He said he found some capsules.

"The Court: The answer to that proposition, we have had them here in the court room, we have all handled them— that is, you have handled them, Frank Breslin has handled them, and the officers handled them—and nobody discovered there was this white powder inside of the capsules until we dumped the capsules out. The reason the white powder was not visible was that the bottom of the box was white and the small amount of powder in the capsules didn't show up until they were put on a dark surface.

"Mr. Umann: I will also say this, your Honor, I understood the capsules were in the possession of the clerk of the Court until the court had made an order.

"The Court: Yes.

"Mr. Umann: Then I understand further that it was Mr. Breslin who obtained the capsules and brought them in to you before any order was issued.

"The Court: Right.

"Mr. Umann: Well, I just made the record.

"The Court: They were brought in at my request, I wanted to look at them.

"Mr. Umann: I say, before the order was issued, he had examined them, after the case had closed for the day.

> "The Court: Oh yes, it wasn't until we took our recess at the end of the day, after he had finished his argument, that I had an opportunity to look at those capsules.
>
> "(Whereupon, proceedings were resumed before the jury.)
>
> "The Court: In the case on trial, permission is granted the District Attorney to reopen the case for the introduction of further testimony which has come to his attention since our taking our recess at 4:00 o'clock, yesterday.
>
> "Mr. Breslin: Thank you, your Honor."

The chemist for the Los Angeles Police Department then testified that the test of the powder in two of the capsules showed that they had contained heroin. One of the jurors inquired:

> "Juror No. 9: If you had've saved this chemical that you had on the spot plate, I believe you called it, after you made your test, if you had taken that and turn it over to another chemist, could he have then taken it and still found heroin in the solution?"

The answer was, "No". During the examination of the witness by another juror the trial judge volunteered the information, "As far as we know, during the course of the trial, nobody opened any capsules here."

The action of the court above noted was prejudicial error. All proceedings in connection therewith were secret. Defendant was not notified and thus given an opportunity to object to such action or to participate therein. Defendant was also denied the right to have another chemist present when the test was made. Also it was prejudicial for the court to remark or, in effect testify, that the capsules had not been opened during the course of the trial.

The defense was more or less apologetic. For example, at one point during the trial which, incidentally lasted three days, defendant's counsel commented, "I appreciate the Court's cooperation, and I am sure the Court understands the tenor in which I have requested the statement. I would like to state to the jury, if I may digress for a moment, that Judge Fricke was both my teacher and I was a student of his; and I am the last one to infer that anything improper was done. I don't mean to infer that at all." And another example:

> "Mr. Umann: May I complete my statement, your Honor? I do not mean that you have failed in your duty, I am not insinuating that, your Honor. It is just difficult because of—I don't mean to infer that—well, let's put it this way, your Honor, I want to object to your leading the witness and pulling him out of a hole every time; because this man is on cross examination, the very veracity of his statements is at stake here, and this Court has—and may the record so show—interrupted the testimony and led the witness as to what he means; and I believe that that is improper, your Honor, and I say, with the utmost respect for this Court—"

The reference to the trial judge's conduct is supported by the record not only once but numerous times; the objection was warranted although delayed. Incidentally, it is the function and duty of the district attorney to conduct the prosecution and the defendant's attorney the defense.

The prosecution rested at the end of the first day of the trial. On the morning of the second day a most unusual incident occurred involving not only the trial judge but defendant's counsel. At the cost of brevity, as recited in the reporter's transcript, it is as follows:

> "The Court: Let the record show the jury, counsel and the defendant present.
>
> "Mr. Umann: At this time, your Honor, we ask the Court to — we will ask the District Attorney to stipulate to a statement, that if you were called as a witness you would testify —
>
> "Mr. Breslin: That if you were called as a witness?
>
> "Mr. Umann: If the Judge were called as a witness, he would testify as to certain proceedings.

"The Court: I think without doing that I can state as to what the facts actually were.

"Mr. Umann: I will ask the Court at this time to make a statement to the jury as to certain proceedings held in the court room, and in chambers, as you have indicated.

"The Court: Yes. Ladies and gentlemen of the jury, this morning after the probation calendar had finished a suggestion was made by Mr. Breslin, and the Public Defender representing Mr. Leiva, the witness who testified here, that his case in which he is charged with selling narcotics be advanced to this date and be tried. There was a suggestion originating with the remark that I made to the effect that if Mr. Martin the Public Defender had come into court and moved to dismiss the Leiva case, I would feel obligated as a matter of law to dismiss it, because under the law Mr. Leiva is not guilty of selling narcotics. The discussion which followed, in which Mr. Martin, Mr. Breslin, and I participated, resulted in the conclusion that since under the evidence Mr. Leiva was not guilty, that to leave the case with a mere dismissal would leave a record in the police department, or the records where criminal records are kept, indicating that he had been charged with the sale of narcotics but the case had been dismissed, leaving it open to explanation as to why it had been dismissed, and not showing upon its face that the reason for his dismissal was that he was not guilty, counsel then stipulated that the case might be tried by the Court without a jury and the Court decide the case upon the testimony which had been received upon this particular trial. Upon which I found Mr. Leiva not guilty.

"Mr. Umann: Now, I will further ask the Court if it is correct that at the time, it was suggested at first that the matter be dismissed so that something may be over his head in case he got in trouble again?

"The Court: There was no such suggestion, Mr. Umann. The dismissal was first mentioned by me when I made the statement that under the evidence as I heard it here, and which of course would be substantially identical with the testimony if Mr. Leiva actually went to trial and Mr. Martin made a dismissal upon the basis of the testimony as I have heard it here, I would feel obligated to dismiss the case, because this evidence fails to show Mr. Leiva guilty of violating the narcotic law.

"Mr. Umann: Well, then, your Honor —

"The Court: In other words, the objection to the dismissal came from counsel.

"Mr. Umann: It was your suggestion at first, and he objected to it, is that right? A. I didn't—I said if Mr. Martin made a motion, I would grant it.

"Mr. Umann: The discussion was they could file over later, is that right?

"The Court: Yes.

"Mr. Umann: May the Court further include in that statement that I was not present during this conference.

"The Court: That is correct, you had left the court room to go to some other court.

"Mr. Umann: I appreciate the Court's cooperation, and I am sure the Court understands the tenor in which I have requested the statement. I would like to state to the jury, if I may digress for a moment, that Judge Fricke was both my teacher and I was a student of his; and I am the last one to infer that anything improper was done. I don't mean to infer that at all."

Thus the principal witness for the prosecution, Mr. Leiva the ex-convict on parole, was completely exonerated and, to use a common expression, given a clean bill of health. The obvious prejudicial effect of the incident requires no comment. On the other hand the defendant, the mother of two children, was, as above noted, denied the right to answer the first question on direct examination, to-wit: "Q. Nellie, have you ever been convicted of any offense before?"

Later in the trial during the cross-examination of Leiva the trial judge remarked, "Objection sustained; furthermore, there is nothing to indicate what relation that has to this case. While the defendant is charged with the sale, I don't see how Leiva could ever be charged with a sale." And again when the People's witness O'Connor was recalled for further cross-examination the court sustained an objection with the remark, in part: "* * * as I have already indicated, in my opinion the defendant Leiva did not violate the narcotic law at all;".

[2, 3] The sole contention on appeal is that, "The defendant's rights were substantially prejudiced by the comments of the trial judge in the presence of the jury." That appellant's contention is supported by the record there can be no question. It is well settled law, indeed elementary, as stated by the court in People v. Conboy, 15 Cal. App. 97, 113 P. 703, 704, that "it is of the highest importance in the administration of justice that the court should never invade the province of the jury, should give them no intimation as to his opinion upon the facts, but should leave them wholly unbiased by any such intimation to ascertain the facts for themselves." The principle is well stated in Sharp v. State, 51 Ark. 147, 10 S. W. 228, 231, wherein the court states that, "The judge has the right, in a criminal prosecution, to interrogate the witnesses. But he has no right to usurp the place of the state's attorney, 'and prescribe the order of introduction of the witnesses, and become active in their examination;' nor has he the right to assume the duties resting on the prisoner's counsel in the general conduct of the defense. He may ask questions which the attorneys had the right to propound, and failed to ask, when the answers to the same may tend to prove the guilt or innocence of the accused. It would be a reproach to the laws of the state if he was required to sit and see the guilty escape, or the innocent suffer, through a failure of parties or their attorneys to ask a witness a necessary question. State v. Lee, 80 N.C. 483; 1 Whart. Ev. § 496.

[4] "In all trials the judge should preside with impartiality. In jury trials especially, he ought to be cautious and circumspect in his language and conduct before the jury. He should not express or intimate an opinion as to the credibility of a witness, or as to controverted facts; for the jury are the sole judges of facts, and the credibility of witnesses".

People v. Cole, 113 Cal.App.2d 253, 248 P.2d 141, at page 146, contains the following on the same subject:

> "By his unjustified finding of contempt; by the statement to the defendant: 'You will prove nothing'; by the entire discussion before the jury which is quoted above the judge not only seriously discredited the defendant in the jury's eyes but threw his judicial weight onto the side of the prosecution in the presence of the jury by at least implicitly vouching for the credibility of the prosecution's witness.
>
> "Our courts have on many occasions pointed out the duty of a trial judge before a jury, both in criminal and civil cases, not to do anything which would lead the jury to believe that the judge was of the opinion that one party or the other should receive the verdict, nor to appear to throw his judicial weight on one side or the other." (Citing cases.) "These cases reiterate the fact that jurors are eager to find and quick to follow any supposed hint of the judge as to how they should decide the case."

Section 1111 of the Penal Code provides that, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Assuming that the appellant was guilty of the offense charged, it appears from the record, both as a matter of fact and as a matter of law, that the witness Leiva was an accomplice and yet the word accomplice was not mentioned during the trial.

[5, 6] In the circumstances it was the court's duty to fully instruct on the law relating to the testimony of an accomplice. As stated in People v. Putnam, 20 Cal.2d 885 at page 890, 129 P.2d 367, at page 369, "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. (Citing cases.) The court is not relieved of the duty to give instructions whose necessity is 'developed through the evidence introduced at the trial.' People v. Warren, supra [16 Cal.2d 103, 104 P.2d (1024) 1031.] An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. People v. Warren, supra; People v. Tapia, supra [131 Cal. 647, 63 P. 1001]; People v. Heddens, 12 Cal.App.2d 245, 55 P.2d 230. Accordingly, it has been held that the court must of its own motion instruct the jury in criminal cases with respect to accomplices and their testimony". See also People v. Heddens, 12 Cal.App.2d 245, 55 P.2d 230; People v. Hubbell, 54 Cal.App.2d 49 at page 68, 128 P.2d 579; and People v. Katcher, 97 Cal.App.2d 209, 217 P.2d 757.

The judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.

* * *

114 Cal.App.2d 1

PEOPLE v. ACOSTA.

Cr. 4731.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1952.

Hearing Denied Nov. 25, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Kenneth C. Newell, J., of burglary, in two counts and with two prior convictions, and he appealed. The District Court of Appeal, Drapeau, J., held that record afforded substantial support of verdict that defendant was guilty of burglary as charged.

Judgment affirmed.

1. Criminal Law 🔑641(1)

In prosecution for burglary, defendant had the right to defend himself without counsel.

2. Criminal Law 🔑1144(8)

Where proceedings to impanel jury were not made part of record on appeal and defendant did not state how trial court erred in selecting jury, the court must presume that official duty was regularly performed. Code Civ.Proc. § 1963, subd. 15.

3. Criminal Law 🔑1035(6)

Impanelment of jury may not be questioned for the first time on appeal.

4. Criminal Law 🔑627½

In prosecution for burglary, where defendant, on day of trial requested production of his automobile, that had been repossessed but its whereabouts were uncertain, trial court's failure to direct order of production was not error as request came too late.

5. Criminal Law 🔑698(1)

Where defendant made a statement on cross-examination about police officers but no motion was made by defendant to strike out testimony, failure to advise jury to disregard statement was not error.

6. Criminal Law 🔑543(1)

Where witness was out of state at time of trial, it was not error to read witness' testimony given at preliminary examination.

7. Burglary 🔑45

In prosecution for burglary, under evidence it was the province of jury to declare defendant's guilt or innocence.

8. Burglary 🔑41(1)

In a prosecution for burglary circumstantial evidence, if substantial, will support the judgment.

Andrew P. Acosta, in pro. per. Edmund G. Brown, Atty. Gen., and Norman H.

Sokolow, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

On the evening of May 12, 1952 two adjoining houses in South Pasadena were ransacked by a burglar, one at 175 Monterey Road, the other at 167 Monterey Road.

Mr. and Mrs. Henze, who lived at 175 Monterey Road, were visiting neighbors across the street. Mrs. Henze went home about nine o'clock to put her baby to bed. When she opened her front door a man who had been inside her house dashed past her and ran away.

Mrs. Henze made an outcry. Her husband heard her and ran out into the street. He saw the man running, chased him, but could not catch him. During his flight the man dropped a suit case, a clock, and some shirts taken from the Henze residence.

Then a police car came along. Mr. Henze told the officers in the car what had happened. They all searched the vicinity but could not find the man.

During the search a black Ford sedan was observed, parked directly east of the Henze driveway. On the back seat of the Ford was a radio, wrapped up in an overcoat.

A watch was set on the car by officers "staked out" on the porch of a near-by house. About midnight their vigil was rewarded, for defendant approached the Ford, got into the front seat, and tried to start the motor. It was then that he was arrested. Admittedly the Ford belonged to him.

The other house next door to the Henzes belonged to Mr. and Mrs. Hamilton Quick. The Quicks were at the beach that evening. On receipt of police notification they came home and found that their house too had been entered, and that Mr. Quick's overcoat and radio were gone. That overcoat and radio were the ones found on the back seat of defendant's car.

The defendant was charged with two counts of burglary and two prior felony convictions. When arraigned, he admitted the prior convictions and pleaded not guilty to the two counts of burglary. He was tried by a jury, convicted, and sentenced to state's prison, and now prosecutes this appeal from the judgment.

[1] Defendant elected to defend himself without counsel during his trial, and is without counsel on appeal. While it is the right of a defendant so to do, the results generally demonstrate the folly of such an election. In this case defendant has been in the county jail pending determination of his appeal, when he should have been earning time on his sentence, and when he was advised by the public defender on the day judgment was pronounced that his chances of success on appeal were infinitesimal.

In a one-page brief defendant argues that it was error: (a) for the trial judge to select the jury, (b) to deny defendant's motion to dismiss under Penal Code Section 995, and (c) to proceed with the trial without procuring defendant's car to exhibit to the jury, to refute the testimony of one of the witnesses for the People.

[2, 3] (a) The proceedings to impanel the jury were not made a part of the record on appeal. Defendant does not state how the trial court erred. This Court must therefore presume that official duty was regularly performed. Code of Civil Procedure, Section 1963, subd. 15. And no objection having been made in the trial court, the impanelment of a jury may not be questioned for the first time on appeal. 8 Cal.Jur., Criminal Law, Sec. 520, p. 506; People v. Johnson, 104 Cal. 418, 38 P. 91; People v. Flores, 15 Cal.App.2d 58, 58 P.2d 1311.

(b) Referring to defendant's contention relative to his motion under Penal Code Section 995: There is no transcript in the record on appeal of the preliminary examination or of the hearing of defendant's motion. Therefore the same rule must be applied.

[4] (c) Referring to defendant's contention of error in the failure of the trial court to direct the production of his automobile: It had been repossessed by a finance company, and its whereabouts were uncertain. Defendant's request that it be produced, made on the day of the trial,

came too late. Moreover, the only purpose to be served by the production of the automobile was to show the condition of its left front fender, to refute the testimony of one of the arresting officers that he did not recall seeing anything out of place on the fender on the night of defendant's arrest. Assuming such evidence could have been produced, it would not in our opinion have changed the conclusion of the jury.

[5, 6] In a supplemental brief defendant argues: (d) that the court should have advised the jury to disregard a statement about police officers made by defendant on cross-examination; (e) that he was not represented by counsel; and (f) that the testimony of a witness out of the state was read from the reporter's transcript of the preliminary examination. None of these contentions has any merit whatever. No motion was made to strike out the testimony; defendant himself requested that he be permitted to conduct his own case; and it was proper to read the testimony of the absent witness. People v. Deveny, 112 Cal.App.2d 767, 247 P.2d 128, as to the first two contentions; People v. McNabb, 63 Cal.App. 732, 219 P. 1031, as to the last contention.

[7] The facts in this case require that the judgment be affirmed. It was the province of the jury to declare defendant's guilt or innocence. Defendant's testimony that his Ford had been stolen the afternoon of the crimes; that later in the evening some one telephoned him where it was; that he reported the theft to the police but did not tell them where he had been told his car was located, lacks the essence of verity, and with the other testimony in the case substantially supports the verdict.

[8] In a prosecution for burglary circumstantial evidence, if substantial, will support the judgment. People v. Colletta, 100 Cal.App.2d 1, 222 P.2d 922. And in a murder case our Supreme Court held that if there is sufficient evidence under any hypothesis to support a judgment, it must stand. People v. Gutierrez, 35 Cal.2d 721, 221 P.2d 22.

From a careful review of the record it is manifest that every courtesy was extended defendant by counsel for the People and by the trial judge, and that, from beginning to end, defendant was given a fair and impartial trial.

No error appearing in the record, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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113 Cal.App.2d 824

ARAPAJOLU et al. v. McMENAMIN, County Clerk, et al.

Civ. 15575.

District Court of Appeal, First District, Division 2, California.

Oct. 24, 1952.

Hearing Denied Dec. 22, 1952.

Petition by persons living on military reservation of United States for peremptory writ of mandate to compel county clerk and his deputy to qualify them as registered voters in county. The District Court of Appeal, Dooling, J., held that persons living in military reservation in California resided within State of California and were entitled to vote as residents of that State.

Peremptory writ of mandate granted.

1. United States 🔑3

Not only may state legislature reserve a portion of pre-existing jurisdiction over land acquired by United States pursuant to constitutional provision that United States shall exercise exclusive legislation over places purchased by consent of state legislature for erection of forts, etc., which is not inconsistent with governmental use for which property is acquired, for Congress may recede to States any jurisdiction not inconsistent with such governmental use. U.S.C.A.Const. art. 1, § 8, cl. 17.

2. Constitutional Law 🔑33

Elections 🔑10½

Conditions contained in constitutional provision giving right to vote to every citizen of United States over 21 years of age who is resident of State for one year, of county for ninety days prior to election, and of election precinct for fifty four days are self-executing and cannot be abridged by legislature. Const. art. 2, § 1.

3. Elections 🔑59

No citizen should be deprived of right to vote on ultra-technical grounds. Const. art. 2, § 1.

4. Elections 🔑78

Residence in military reservation in California of civilian employees of United States, members of Armed Forces of United States, etc., was residence in State of California, since California has jurisdiction over area in substantial particulars, and such persons acquired residence, and were entitled to vote as residents of California. U.S.C.A.Const. art. 1, § 8, cl. 17; Const. art. 2, § 1.

5. Elections 🔑59

The right to vote is personal to a citzen and depends upon whether he has requisite qualifications under election laws. Const. art. 2, § 1.

6. Elections 🔑78

If state retains jurisdiction over federal areas, although not expressed, sufficient to justify a holding that it remains part of State, a resident in such federal area is entitled to vote as state resident. U.S.C.A. Const. art. 1, § 8, cl. 17; Const. art. 2, § 1.

◆

Farr & Millard, Carmel, for petitioners.

Burr L. Scott, Dist. Atty. of Monterey County, Joseph A. Stave, Deputy Dist. Atty., Salinas, for respondents.

DOOLING, Justice.

The petitioners, fifteen in number, seek by writ of mandate to compel respondents, county clerk of Monterey County and his deputy in charge of the registration of voters, to qualify them as registered voters of said county.

All of the petitioners reside on military reservations situated within the exterior boundaries of Monterey County, some at Fort Ord, some at the Presidio of Monterey, and the others at Hunter Liggett Military Reservation. Some of the petitioners are civilian employees of the United States Government, some are in the armed forces of the United States, some are spouses of persons in these two classes and one is a civilian with her own mercantile business who is also postmistress of Jolon within the confines of Hunter Liggett Reservation. All of the petitioners have the necessary length of residence to qualify them as voters in Monterey County if residence on a military reservation of the United States within the exterior boundaries of Monterey County is residence within the State of California and the county within the meaning of section 1, Article II of the Constitution of California which gives the right to vote to every citizen of the United States over 21 years of age 90 days prior to any election "who shall have been a resident of the State one year next preceding the day of the election, and of the county * * * ninety days, and in the election precinct fifty-four days". The ground upon which respondents have cancelled the registration of some of petitioners and refused to accept the registration of the others is the claim that the military reservations on which they respectively reside are subject to the exclusive jurisdiction of the United States and hence are not legally a part of the territory of the State of California.

The question arises under clause 17, section 8, Article I of the United States Constitution which gives Congress the power "To exercise exclusive Legislation in all Cases whatsoever, over such District * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and *to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, magazines, arsenals, dock-yards, and other needful Buildings*". (Emphasis ours.)

It has been consistently held whenever the question has arisen that property acquired by the United States under this provision of the Constitution of the United States, with the consent of the Legislature of any state which confers the exclusive power of legislation on Congress, ceases in legal contemplation to be a part of the territory of the State and hence residence thereon is not residence within the State which will qualify the resident to be a voter therein. Opinion of Justices, 1 Metc. 580, 42 Mass. 580; Sinks v. Reese, 19 Ohio St. 306; In re Town of Highlands, Sup., 22 N.Y.S. 137; McMahon v. Polk, 10 S.D. 296, 73 N.W. 77, 47 L.R.A. 830; State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S.W. 299; Herken v. Glynn, 151 Kan. 855, 101 P.2d 946; Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884.

The rationale of these decisions is clearly stated in Sinks v. Reese, supra, 19 Ohio St. at page 316:

> "By becoming a resident inmate of the asylum, a person though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relieved from any obligation to contribute to her revenues, and is subject to none of the burdens which she imposes on her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the State of Indiana or Kentucky, or the District of Columbia."

It may be conceded that where the Congress exercises the power of exclusive legislation over territory acquired by the United States with the consent of a State Legislature the State thereby loses all jurisdiction over such territory and such territory is no longer in legal contemplation a part of the State, but such concession is not conclusive of the question presented to us under the conditions presently existing.

It was long doubted whether a State could constitutionally reserve any jurisdiction over land acquired by the United States with the consent of the State Legislature under clause 17, section 8, Article I of the United States Constitution. Thus Justice Field speaking for the Supreme Court of the United States said in Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525, 532–533, 5 S.Ct. 995, 999, 29 L.Ed. 264:

> "When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the attorneys general."

The only reservation then recognized was that civil and criminal process of the state courts might be served therein and this was treated as an act of comity and not as a reservation of any jurisdiction in the State. In the same case, referring to this right to serve State process within such Federal enclaves Justice Field quoted from the opinion of Justice Story in United States v. Cornell, Fed.Cas.No.14,867, 2 Mason 60, Fort Leavenworth R. R. Co. v. Lowe, supra, 114 U.S. at page 534, 5 S.Ct. at page 1000:

> "Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise, as *quoad hoc* his own process."

In the later case of Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L. Ed. 1091, this doctrine was reaffirmed in a case holding that a State could not tax private personal property located on a military reservation acquired by the United States with the consent of the State Legislature under cl. 17, sec. 8, Art. I of the United States Constitution. The court said, 281 U.S. at page 652, 50 S.Ct. at page 457:

> "The question is not an open one. It long has been settled that, where lands for such a purpose are purchased by the United States with the consent of the state Legislature, the jurisdiction theretofore residing in the state passes,

> in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction."

This question, however, was later reexamined by the Supreme Court of the United States in James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155. In that case after holding that the lands acquired by the United States (for a dam site) with the consent of the State Legislature fell within the provisions of cl. 17, sec. 8, Art. I of the United States Constitution, 302 U.S. at page 143, 58 S.Ct. at page 213, the court upheld as constitutional a reservation of concurrent jurisdiction in the state in so far as its exercise would not be inconsistent with the governmental uses. The court said 302 U.S. at pages 148–149, 58 S.Ct. at page 216:

> "Clause 17 contains no express stipulation that the consent of the state must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the state and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent, or property has been acquired by condemnation. In the present case, the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective."

The court further commented, 302 U.S. at page 148, 58 S.Ct. at page 215:

> "The possible importance of reserving to the state jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the states are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the state be compelled to grant it in giving its consent to purchases."

[1] Since the decision of the United States Supreme Court in the Dravo case it has become established law that not only can the State Legislatures reserve to their States a portion of their preexisting jurisdiction in the cases where land is acquired within their borders by the United States pursuant to cl. 17, sec. 8, Art. I of the United States Constitution, so long as such reserved jurisdiction is not inconsistent with the governmental use for which the property is acquired, but also that the Congress may recede or return to the States any jurisdiction over such properties which is not inconsistent with such governmental use.

Thus, although workmen's compensation laws cannot extend over Federal lands within the State while the United States has exclusive jurisdiction, Allen v. Industrial Accident Comm., 3 Cal.2d 214, 43 P.2d 787; cf. Atkinson v. State Tax Comm., 303 U.S. 20, 25, 58 S.Ct. 419, 82 L.Ed. 621, by an Act of Congress now codified in 40 U.S.C.A. § 290 the operation of such laws has been extended to "all lands and premises owned or held by the United States of America * * * which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State * * *."

In Capetola v. Barclay White Co., 3 Cir., 139 F.2d 556, 153 A.L.R. 1046, certiorari denied 321 U.S. 799, 64 S.Ct. 939, 88 L. Ed. 1087, the Circuit Court of Appeals, said of this Act at page 559 of 139 F.2d:

> "It is, of course, patent from a reading of the Act of 1936 that Congress did not thereby adopt State Compensation Acts as federal law applicable to federal territories within the exterior boundaries of the States. But it is our opinion that the purpose and effect of the congressional Act was to free State workmen's compensation laws from the restraint upon their enforcement theretofore existing by reason of the exclusive federal jurisdiction of lands within the States and that, forth-

> with upon the federal enactment, Pennsylvania's Workmen's Compensation Act became operable as to injuries received by employees of private employers on federal property within the State's exterior boundaries. The situation created by the Act of 1936 was no different, so far as the operation of Pennsylvania's compensation law is concerned, than it would have been had Pennsylvania never ceded jurisdiction of the Navy Yard site to the federal government."

In like fashion the Congress has receded and returned to the States jurisdiction over federal lands within their borders to enforce State unemployment insurance acts therein, 26 U.S.C.A. § 1606(d); to tax motor fuels sold therein, 4 U.S.C.A. § 104; to levy and collect sales and use taxes therein, 4 U.S.C.A. § 105; and to levy and collect State income taxes therein, 4 U.S.C.A. § 106. The power to collect all such taxes depends upon the existence of State jurisdiction over such federal lands and therefore may not be exercised in territory over which the United States has exclusive jurisdiction. Standard Oil Co. v. California, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775. In recognition of this fact the Congress has made these recessions to the States in terms of jurisdiction, e. g. 4 U.S.C.A. §§ 105 and 106: "and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State * * *"; 26 U.S.C.A. § 1606(d): "and any State shall have full jurisdiction and power to enforce the provisions of such law * * as though such place were not owned, held, or possessed by the United States."

Of the recession by the Congress to the States of the jurisdiction over federal lands to levy and collect income taxes on incomes earned therein or by residents thereof the Supreme Court of Pennsylvania said in Kiker v. City of Philadelphia, 346 Pa. 624, 31 A.2d 289, at page 295, certiorari denied 320 U.S. 741, 64 S.Ct. 41, 88 L.Ed. 439:

> "The reservation is immediately adjacent to Philadelphia; is geographically within its limits; and since December 31, 1940, because of the provisions of Public Act No. 819 [4 U.S.C.A. § 14], *is actually part of that City* for the purposes of imposing the tax here under consideration." (Emphasis ours.)

So in speaking of the recession of jurisdiction to collect taxes on motor fuel used or sold on federal lands the Oklahoma Supreme Court in Sanders v. Oklahoma Tax Commission, 197 Okl. 285, 169 P.2d 748, certiorari denied 329 U.S. 780, 67 S.Ct. 202, 91 L.Ed. 670, used the following language found on page 751 of 169 P.2d:

> "It follows that plaintiff, having used the gasoline in an area which in legal contemplation *was no different from any other part of the state*, became liable for the tax upon its use and the trial court correctly so held." (Emphasis ours.)

There seems no necessity to multiply citations. It is clear that the Congress has receded to the States jurisdiction in substantial particulars over federal lands over which the United States previously had exclusive jurisdiction. It may no longer be said of those lands that they are, as said by the Ohio court in Sinks v. Reese, supra, "as foreign to Ohio (California) as is the State of Indiana or Kentucky, or the District of Columbia."

It is settled for Calfornia by the case of Johnson v. Morrill, 20 Cal.2d 446, 126 P.2d 873 that where the United States does not accept exclusive jurisdiction over lands held by it residence therein is residence within the State of California for voting purposes.

[2, 3] The right to vote is granted by the constitution of the State and the conditions set forth in section 1, Article II thereof are self-executing and cannot be abridged by the Legislature. Spier v. Baker, 120 Cal. 370, 52 P. 659, 41 L.R.A. 196; Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889; McMillan v. Siemon, 36 Cal.App.2d 721, 98 P.2d 790. The right to vote has been described "as one of the highest privileges of the citizen", Spier v. Baker, supra, 120 Cal. at page 375, 52 P. at page 661, and as "one of the most important functions of good citizenship". McMillan v. Siemon, supra, 36 Cal.App.2d page 726, 98 P.2d at page 793. No citizen should be disfranchised lightly or on ultra-technical grounds. All of the election cases cited above, except Arledge v. Mabry, supra, 197 P.2d 884, in which residents on federal lands were held not to be residents of the State so as to qualify them to vote were decided at a time when the United States did have and exercise exclusive jurisdiction over those lands, and while Arledge v. Mabry was decided after the recessions of jurisdiction above set out the court in that case did not consider their effect but assumed that the United States still had and exercised exclusive jurisdiction. See 197 P.2d at page 890 where the court says:

> "In a variety of situations, other than that involving the right of residents of ceded land to exercise the elective franchise, both state and federal courts have held the jurisdiction of the United States to be full and complete, or as the selected word, 'exclusive', implies."

[4] The jurisdiction over these lands is no longer full or complete or exclusive. A substantial portion of such jurisdiction now resides in the States and such territory can no longer be said with any support in logic to be foreign to California or outside of California or without the jurisdiction of California or within the exclusive jurisdiction of the United States. It is our conclusion that since the State of California now has jurisdiction over the areas in question in the substantial particulars above noted residence in such areas is residence within the State of California entitling such residents to the right to vote given by sec. 1, Art. II of our Constitution.

This conclusion accords with an excellent opinion of the Attorney General of the State given to the District Attorneys of several counties on September 6, 1952, (Opinion No. 52–183) 20 Opinions of the Attorney General of California 127.

[5, 6] Respondents argue in their brief: "The states could have reserved the right to vote at the time of original cession where such right did not conflict with federal use of the property * * * but did not do so." We cannot follow the force of this argument. The State of California did not relinquish to the United States the right of citizens resident on federal lands to vote nor did the United States acquire those rights. The right to vote is personal to the citizen and depends on whether he has met the qualifications of sec. 1, Art. II of our Constitution. If the State retains jurisdiction over a federal area sufficient to justify a holding that it remains a part of the State of California a resident therein is a resident of the State and entitled to vote by virtue of the Constitutionally granted right. No express reservation of such rights is necessary, nor could any attempted express cession of such rights to the United States be effective.

As to those petitioners who are members of the armed services respondents make the additional argument that they cannot legally acquire residence in the areas in which they are stationed, because they do not "voluntarily" reside there. Cases from other jurisdictions are cited to this effect. It is sufficient to point out that this has never been the rule in California. Our cases hold that members of such services can acquire residence where they are stationed. People ex rel. Budd v. Holden, 28 Cal. 123, a voting case; Stewart v. Kyser, 105 Cal. 459, 39 P. 19, a voting case; Percy v. Percy, 188 Cal. 765, 207 P. 369; Berger v. Superior Court, 79 Cal.App.2d 425, 179 P.2d 600. The rule is simply stated in Percy v. Percy, supra, 188 Cal. at page 768, 207 P. at page 370:

> "The fact that, at the time in question, he was on military duty in an army camp did not preclude him from establishing his residence there if he so desired."

It is ordered that a peremptory writ of mandate issue as prayed.

GOODELL, Acting P. J., and JONES, J., pro tem., concur.

Hearing denied; SHENK, EDMONDS, and CARTER, JJ., dissenting.

MALONE et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. *

Civ. 15245.

District Court of Appeal, First District, Division 2, California.

Oct. 30, 1952.

Rehearing Denied Nov. 29, 1952.

Hearing Granted Dec. 19, 1952.

Original proceedings were brought to review order of Superior Court directing the perpetuating of testimony and directing issuance of subpoenas duces tecum. The District Court of Appeal, Goodell, J., held that applicant was entitled to the perpetuating of testimony to be used in proposed accounting action.

Peremptory writ denied and alternative writ discharged.

1. Quo Warranto ⚷5

Quo warranto is the exclusive procedure to test right of appointed persons to sit on the Democratic County Central Committee of the City and County of San Francisco. Elections Code, § 2833.

2. Quo Warranto ⚷32, 33

A quo warranto proceeding must be brought by the Attorney General in the name of the people of the state. Code Civ. Proc. § 803.

3. Quo Warranto ⚷34

Member of the Democratic County Central Committee of the City and County of San Francisco could not maintain a quo warranto proceeding against a person illegally holding position as member of the committee. Code Civ.Proc. § 803.

4. Quo Warranto ⚷32

A relator is not a party to a quo warranto proceeding, and an attempt to make him such, or an attempt by a relator to prosecute a proceeding in his own name is ineffective for any purpose. Code Civ. Proc. § 803.

5. Officers ⚷82

An injunction suit is not available to try title to public office.

6. Depositions ⚷11, 58

Member of Democratic County Central Committee of the City and County of San Francisco was not entitled to court order directing perpetuation of testimony and order directing issuance of subpoenas duces tecum to take testimony of allegedly illegal members of committee and to have certain documentary evidence produced by them for purpose of contemplated action to test right of such allegedly illegal members of committee to sit on committee. Code Civ.Proc. §§ 2083–2089, 2084, subds. 1, 3.

7. Depositions ⚷11, 58

Member of the Democratic County Central Committee of the City and County of San Francisco was not entitled to court order directing perpetuation of testimony and order directing issuance of subpoenas duces tecum to take testimony of allegedly illegal members of committee and to have certain documentary evidence produced by them for purpose of showing that committee called and held illegal meetings, where there was no showing how any future litigation could possibly be corrective of alleged irregularities in meetings already held. Code Civ.Proc. §§ 2083–2089, 2084, subds. 1, 3.

8. Elections ⚷121(1)

Member of the Democratic County Central Committee of the City and County of San Francisco could qualify as a party plaintiff in accounting proceedings against allegedly illegal members of committee, who were allegedly guilty of illegal handling and expenditures of funds of committee.

9. Depositions ⚷11, 58

Member of the Democratic County Central Committee of the City and County of San Francisco was entitled to court order directing perpetuation of testimony and order directing issuance of subpoenas duces tecum to take testimony of allegedly illegal members of committee and to have certain documentary evidence produced by them for purpose of showing allegedly illegal handling and expenditures of funds of committee, so that such evidence could be used in an accounting action. Code Civ. Proc. §§ 2083–2089.

William J. Dowling, Jr., San Francisco, for petitioners.

Delany, Fishgold, Werchick & Minudri, San Francisco, for respondents.

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* Subsequent opinion 254 P.2d 517.

GOODELL, Justice.

In a proceeding filed in the Superior Court entitled "Application for order directing perpetuating testimonies and for order directing issuance of subpoenas duces tecum", Elmer P. Delany (named therein as the real party in interest) sought to take the testimony of petitioners and to have certain documentary evidence produced by them. The court so ordered, and this proceeding followed.

The showing before the Superior Court, which was made by a verified petition supplemented by an affidavit, is now attacked as insufficient under §§ 2083–2089, Code Civ. Proc.

Section 2084 provides that "The applicant must produce to a judge of the superior court a petition, verified by the oath of the applicant, stating: 1. That the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; * * * and, 3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. * * *"

In Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 345, 298 P. 1001, 1003, the court said: "Of the eight requirements under the old practice, only three are found in our statute, namely: (1) *The reason for the perpetuation of the testimony, that is, that the applicant expects to be a party to an action;* (2) the names of the witnesses to be examined and their places of residence; and (3) a general outline of the facts expected to be proved." (Emphasis added.)

It will be assumed herein that a cause of action need not be pleaded in the application. Brown v. Superior Court, 34 Cal.2d 559, 563, 212 P.2d 878.

The application of respondent Delany alleges "That he expects to be a party plaintiff in an action or actions to be brought in a court or courts of this state" and names William M. Malone and Webster K. Nolan as expectant adverse parties therein. It names the witnesses to be examined and gives their places of residence, as required by § 2084(3). It gives a "general outline of the facts expected to be proved", but such outline is attacked herein as being insufficient as a compliance with § 2084(3).

The application then alleges that the prospective "action or actions will involve the following issues, to wit:

> "a. The illegal appointment and/or appointments of persons to the Democratic County Central Committee of the City and County of San Francisco.
>
> "b. The illegality of certain appointive positions on said * * * Committee, and of the acts of said * * * Committee, in which said illegally appointed persons participated.
>
> "c. The illegal conduct of the business, affairs and concerns of said * * * Committee.
>
> "d. The illegal handling and expenditures of the funds of said * * * Committee.
>
> "e. The calling and holding of illegal meetings of said * * * Committee.
>
> "f. The calling and holding of putative meetings of said * * * Committee.
>
> "g. The failure to call legal meetings of said * * * Committee."

It names five members of the committee as "acting and/or de facto" officers thereof i. e.: said Malone, chairman; Arthur T. Poheim, vice-chairman; Joseph T. Curley, secretary; J. Stanly Klein, treasurer, and Joseph P. Byrne, financial secretary. It alleges that said Nolan "is an acting and/or de facto appointed member of said * * * Committee".

It alleges that Malone is expected to testify that he "is acting as the chairman of said * * * Committee; that he has illegally appointed various persons to said Committee; that he has allowed said illegal appointees to participate in the affairs of said Committee; that by use of said illegal appointees' votes, said William M. Malone has effectively blocked the conduct of said Committee from the duties and purposes for which it legally exists". It alleges that said Nolan is expected to testify that he "is an appointed member of the * * * Committee; that he was illegally appointed to said position by said William M. Malone; that as such illegally appointed member of said Committee he has participated in the voting and the actions of said * * * Committee; that he holds the office of * * * Committeeman * * * illegally."

The affidavit states that respondent Delany is a duly elected member of the Committee; that Poheim acted as secretary of a committee meeting held on October 3, 1951; "that the roll call of persons attending said meeting, and the minutes thereof, are necessary, material and admissible to the issues involved herein, in that they will disclose the names of all persons in attendance at said meeting, including those which were there under color of right as appointed members of said Committee, *whose right and title to office may be the subject of a proceeding in the nature of quo warranto, or to a proceeding for injunctive relief against the chairman of said * * * Committee* to prevent the calling of further meetings without notice and with persons thereat not elected and qualified according to law." It alleges that the testimony of Curley is required and the minutes in his possession as secretary "are necessary, material and admissible to the issues and matters involved herein, in that they contain evidence showing when, how, and under what pretext members have been appointed to said * * * Committee, as well as the names of all those appointed, *which would be involved in a proceeding quo warranto to try said appointed members' title to their office;*" (Emphasis added.)

In his brief respondent Delany says:

> "The affidavit goes further in showing the nature of the contemplated actions which is beyond the rules previously stated, and apprises the parties expectant of the nature of the wrong and the remedy.
>
> "a. *The application and affidavit in support of subpoena duces tecum show that real party of interest seeks to test the right of 'appointed' persons, to sit on the County Committee.*
>
> "The application and the affidavit in support of subpoena duces tecum showed that real party in interest seeks to prove that at least one of the parties expectant, and others, have been appointed to the County Committee, the subject of the within controversy. Section 2833 of the Elections Code of the State of California reads as follows:
>
> " 'In any city and county the county central committee of each party shall be elected by each assembly district and shall consist of five members from each assembly district in the city and county. *The county committee in any city and county may increase its membership by a majority vote of the committee.*'" (The emphasis is respondent Delany's.)

Four distinct points are then set forth, with authorities, to show that the emphasized part of § 2833 is "clearly unconstitutional."

[1] From the showing of the applicant and from his brief it appears that the avowed purpose of the contemplated action is to "test the right of 'appointed' persons, to sit on the County Committee." Quo warranto is the exclusive procedure to accomplish that result. 22 Cal.Jur. 210, 211.

One of petitioners' main contentions is that respondent Delany failed to show that he occupied any special status, or had any legal standing, qualifying him to prosecute any prospective action or proceeding to challenge the appointment of a committeeman, or to unseat him. If he had no such qualification it would follow that he had no right under §§ 2083–2089 to perpetuate anybody's testimony, since according to the Kutner-Goldstein case, supra, the only reason why he could invoke those sections would be the fact that he expected "to be a party to an action".

[2–4] Since a quo warranto proceeding must be "brought by the attorney-general, in the name of the people of this state", § 803, Code Civ.Proc., it is clear that the applicant could not possibly be a party to such a proceeding. Nor could Malone (named as an expectant adversary) be a party since it would be brought against the person holding or exercising the challenged office, § 803, supra. Moreover, even a "relator is not a party to the action, and an attempt to make him such, or an attempt by a relator to prosecute a proceeding in his own name, is ineffective for any purpose". 22 Cal. Jur. p. 219; People ex rel. Hershey v. Reclamation District No. 108, 169 Cal. 786, 147 P. 1176; People ex rel. Cage v. Petroleum Rectifying Co., 21 Cal.App.2d 289, 68 P.2d 984.

In respondent Delany's brief the statement is made that "Before any injunctive proceeding, or quo warranto proceeding may be instituted, it is of course necessary that the facts of appointment and the identity of those appointed be reduced by way of testimony." No authority has been presented supporting the proposition that a person expecting to urge the commencement of a quo warranto proceeding can use the machinery of §§ 2083–2089 to procure evidence for such proceeding. Hollman v. Warren, 32 Cal.2d 351, 196 P.2d 562, cited by respondent Delany, is a mandate case which deals only with the constitutionality of the statute limiting the number of Notaries Public in San Francisco and contains nothing one way or the other on the question now presented.

[5] An injunction suit would not be available to the applicant since "It is thoroughly settled that title to public office may not be tried in a suit for an injunction". Barendt v. McCarthy, 160 Cal. 680, 683, 118 P. 228, 229; Purviance v. Compton, 94 Cal. App. 277, 280, 271 P. 120.

[6] For these reasons we must conclude *with respect to this phase of the case* that the applicant was not entitled to the perpetuation of petitioners' testimony or to the issuance of subpoenas duces tecum.

The remaining issues dealing with claimed irregular meetings:

The first two issues which deal with appointive members have been discussed. Of the other five, four of them deal with alleged illegal conduct of the committee's "business, affairs and concerns"; with the alleged calling and holding of illegal and putative meetings, and with the failure to call legal meetings.

The application alleges that illegal meetings have been called and held, and there has been a failure to call legal meetings; that the secretary of the committee has notified illegal members of illegal meetings and has failed to notify legal members of legal meetings; that he has possession and control of the official minutes and correspondence of the committee, all of which, it is alleged, are admissible and material in the prospective action.

[7] In the first place, it would appear that these grievances are by-products of the claimed appointments of committeemen under § 2833, Elections Code, and, if so, they are connected with the first two issues already discussed. But, secondly, and in any event, there does not appear from the "outline" how any future litigation could possibly be corrective of irregularities in the conduct of meetings already held and conducted. While it might not be necessary, as we have seen, that an application to perpetuate testimony must state a cause of action, still it would not follow that testimony could be taken under §§ 2083–2089, Code Civ.Proc., to remedy alleged failures to properly call meetings or to correct procedural irregularities in the conduct thereof when such litigation would present no justiciable controversy. For these reasons we are satisfied that the applicant was not entitled to the perpetuation of petitioners' testimony on this phase of the case, or to the issuance of subpoenas duces tecum thereon.

The issue dealing with the alleged "illegal handling and expenditures of the funds" of the committee:

This presents an altogether different question from the one just discussed.

The application alleges that there have been concealed from the committee as a whole "the assets, money and funds" of the committee, and the handling and expenditure thereof; that the secretary has possession and control of the official minutes and correspondence of the committee, all of which are admissible and material in the prospective action. It alleges that the acting treasurer and financial secretary are in charge of the committee's funds and expenditures, and that the "assets, moneys and funds, are concealed from the knowledge of the membership of said * * * Committee"; that in their respective capacities, they "have personal knowledge of all of said financial affairs, and that they have in their possession and under their control, the books of account, the financial records, the checks, check-books, and all of the other financial data concerning said * * * committee, which said documents contain evidence which is admissible and material to the issues involved in the action in which said applicant expects to be a party plaintiff."

The affidavit states that the minutes are in the secretary's possession and control "and that said minutes would be further necessary, material, and admissible, so as to show the manner in which the financial affairs of said * * * committee have been withheld from the membership at large, even though the applicant herein has demanded the same, which said information would be evidence in a suit for an accounting."

It thus appears that an action for an accounting is contemplated—a question which is severable from the question of trying title to public office, and from the question of irregular meetings.

[8] The accounting has to do with funds in the hands of public officers, and it is alleged that the applicant, *who is a member of the committee,* expects to be the plaintiff in such action. In Hollman v. Warren, 32 Cal.2d 351, 357, 196 P.2d 562, it was held that the petitioner there, aside from being an applicant for a notarial commission, could maintain the proceeding in mandate as a citizen and taxpayer *because the case was one involving public rights and duties.* We do not believe that the petitioners' attack on the applicant's right to perpetuate testimony (which attack we hold to be well taken) holds good as to such proceedings as those now under discussion. In other words while the applicant could not be a party in quo warranto, he could qualify as a party plaintiff in accounting proceedings *because he is a member of the committee, and because the subject-matter of such case would be the handling of funds in the hands of public officers.*

There is nothing in the record to indicate the source or sources of such funds, or that they are derived from taxation, but it would seem to be sufficient that it is alleged that funds in the hands of public officers have been illegally handled and administered; *and that the applicant is a committee-member.*

[9] Under the liberal rule of the Kutner-Goldstein case, 212 Cal. 345, 298 P. 1001, 1003, that "Ordinarily nothing more than the statutory requirements is necessary to be shown in the application" it would seem that the "outline", in so far as this issue is concerned, is sufficient.

We fully appreciate that the "outline" with respect to the accounting phase of the case is extremely broad and general but presumably the persons whose testimony is sought under §§ 2083–2089 will have ample protection under the safeguards indicated in Brown v. Superior Court, 34 Cal. 2d 559, 566, 212 P.2d 878, 882. There the trial court had ruled that the witnesses need not complete their depositions because a cause of action had not been stated in the application for the testimony. This was held to be error. The Supreme Court recognized that some of the questions asked might have been objectionable, but said: "Inquiry into the matter should not be foreclosed since, in a proceeding to perpetuate testimony, as in other deposition proceedings, any question asked is subject to objection on legal grounds, and a witness need not answer until the court rules that the question is proper and should be answered. Code Civ.Proc. § 1991."

Under the orders sought to be annulled herein no questions should be directed to be answered relating to appointments to the committee under § 2833 of the Elections Code, or the legality or constitutionality of that section, since it appears for reasons already given that the applicant could not be a party in quo warranto proceedings. Nor should any questions be directed to be answered relating to the alleged illegal meetings. On the accounting phase of the case (last above discussed), in our opinion the testimony may be perpetuated.

Accordingly a peremptory writ is denied and the alternative writ is discharged, without costs to either side.

NOURSE, P. J., and DOOLING, J., concur.

113 Cal.App.2d 890

In re WHITE'S ESTATE.

FIRST NAT. BANK IN SANTA ANA v. HETZEL.

Civ. 4453.

District Court of Appeal, Fourth District, California.

Oct. 29, 1952.

Proceeding for construction of a will whereby testatrix created a life estate and provided that upon termination thereof, property should be sold and trust funds established from which certain payments should be made to grandchildren of life tenant for their higher education until separate funds were exhausted. The Superior Court, Orange County, Kenneth E. Morrison, J., entered an order in favor of such grandchildren, and the residuary legatee appealed. The District Court of Appeal, Griffin, J., held that although, because of the life tenant's longevity, the grandchildren had completed their college educations prior to termination of the life estate, the proceeds of the sale were distributable to them, rather than to the residuary legatee.

Affirmed.

1. Wills 🔑439, 440

In construction of a will, the primary and cardinal rule to be observed is to ascertain testator's intent, and ordinarily such intent is to be ascertained from the will itself.

2. Wills 🔑685

Under will creating life estate and providing that upon termination thereof, property should be sold and trust funds established and stipulated periodic payments made therefrom to grandchildren of life tenant for their higher education until separate funds were exhausted, such grandchildren, rather than residuary legatee, were entitled to proceeds of the sale, though, because of life tenant's longevity, grandchildren had obtained their college educations prior to termination of life estate.

◆

Head, Jacobs & Corfman, Robert H. Jacobs, Santa Ana, for appellant.

Forgy, Reinhaus & Forgy, Nelson Kogler, Santa Ana, for respondent.

GRIFFIN, Justice.

On October 24, 1923, Margaret Hetzel White executed her will and created a life estate and testamentary trust in her home in Laguna. She gave all of her personal property to her husband, William Henry White, and the income and use of the home so long as he lived. Subject to this life estate she devised the home to the First National Bank in Santa Ana, as trustee, to hold in trust "subject to the following purposes":

> "That said Trustee shall ascertain how many children are then living, being the issue of my husband's son and daughter, who are named respectively, Reginald M. White of Rochester, New York, and Daisy Colebeck of Bellwood, Pennsylvania. That at the present time there are living the issue of said Daisy Colebeck, two boys one named Paul Frederick Colebeck, and the other Gilbert Colebeck. That after ascertaining the number of children as aforesaid who are then living said *Trustee shall* proceed to *sell* said real property as soon as the same can advantageously be done *and deduct* from said proceeds of the sale of said property, 1st, an amount of $1000.00 which it shall pay to my nephew, Joseph Linn Hetzel, of Southport, Connecticut, and 2nd, an *amount* equal to the *number of months by which I survive my said husband,* (Apparent error as to the term "by which I survive my said husband" is corrected in the decree of distribution which reads: "by which

> the said Margaret White is survived by her said husband",) multiplied by $30.00 and the total amount so arrived at *shall be divided into* as many *portions* as there are grandchildren of my said husband.
>
> "There *shall be paid* by said Trustee *for the education* of each of said grandchildren of my said husband, in branches higher than those studied in high school grades the sum of $30.00 per month until each of said portions has been exhausted. If any of said grandchildren should die before graduating from high school, or if any of said grandchildren should fail to continue his or her education through the high school grades or if any of them should thereafter refuse to continue their education beyond high school grades and cessation of attending any school for a period of one year shall be conclusively be presumed that said grand child does not intend to take advantage of the *bequests* herein made, then I direct that said *Trustee shall pay* the *sums* which would otherwise *be paid to the education* of said child *for the education* of the remaining grand-children, *dividing* the *same equally* between them *until* the *said fund* secured as hereinabove provided for *has been entirely exhausted*." (Italics ours.)

"Subject to the foregoing provisions" she gave the residue of her property to her nephew, Joseph Linn Hetzel.

On August 24, 1927, the court ordered distribution "in accordance with the provisions of the will", and in about the same language. At the time of making the will the two living grandchildren were of the ages of eight and twelve years. The husband lived to be 90 years of age, and did not die until June 2, 1950. Accordingly, due to his longevity, no funds from the trust were available to pay the grandchildren for their college education. At the time of the husband's death, the grandchildren were 35 and 39 years of age respectively and had completed their high school and college educations.

In August, 1950, the trustee petitioned the court for instructions, set up the will, recited the above-mentioned facts, and stated that it believed it was the intention of the decedent to benefit the said grandchildren with the proceeds of the sale of the property excepting the $1,000 to be paid to the nephew, and asked that the property be appraised and sold and that the proceeds be distributed accordingly. The property was sold for $5,426.35, and the trustee petitioned for distribution. After notice and hearing the court ordered the trust terminated and after payment of $1,000 to Mr. Hetzel, and after deducting costs, ordered that the proceeds be distributed equally to the two grandchildren. Thereafter, the court set aside this portion of the order for the purpose of considering objections to the petition of the trustee for instructions, and the petition of the residuary legatee for instructions and for distribution of the remainder of the estate to him. Thereafter, on July 13, 1951, the objections were "overruled" and the petitions of the residuary legatee were denied, from which orders he appealed.

It is appellant's position first, that the educational trust, set up by the last will and the decree of distribution pursuant thereto for the benefit of the grandchildren, failed and terminated since, at the time of the life tenant's death, and due to his longevity, the grandchildren had completed their college education. In support of this contention he cites such cases as Adams v. Spalding, 12 Conn. 350; and New Britain Trust Co. v. Stoddard, 120 Conn. 123, 179 A. 642. He then contends that as a result thereof appellant, being the residuary legatee, is entitled to the entire proceeds of the trust estate, citing such cases as Horton v. Winbigler, 175 Cal. 149, 158, 165 P. 423, and the rule announced in 11B Cal.Jur. p. 803, sec. 1299.

[1] In the construction of a will, the primary and cardinal rule to be observed is to ascertain the intent of the testator, and ordinarily, the intent of the testator is to be ascertained from the will itself. In re Estate of Emerson, 139 Cal.App. 571, 34 P.2d 800; In re Estate of Kisling, 68 Cal.

App.2d 163, 167, 156 P.2d 57. The cases relied upon by appellant are factually dissimilar from the instant case. In the Adams cases the trust provided for the obtaining of a degree on reaching the age of 22 years. The case held that the beneficiaries were then too advanced in years and settled in life to take under the provisions of the trust. The case also turned on the question of whether the testator intended the trust to apply to sons born after the testator's death. In the New Britain case the terms of the trust were " 'to use the principal and income of said fund in whatever way may be deemed best to assist' " (the mother, the trustee). There the grandsons had finished their schooling and established themselves in business before the life tenancy was terminated. The question was reserved by the Superior Court for the advice of the Supreme Court of Errors. That court said that the trust terminated and stated, 179 A. at page 644:

> "A further indication of what was in the mind of the testator in the present case is found in the fact that the fund was committed to the care, judgment, and control of the mother of these boys, and was stated to be to 'assist' in their education, a task which rested primarily upon their parents."

The case at bar is thus distinguishable because in the New Britain case the trust was for the purpose of assisting the mother in obtaining education for the grandchildren. In the instant trust the trustor clearly expressed the intent to pay *for the educations.* It should be here noted that the only contingencies under which the funds or "bequests" (as used in the trust so set up) should not be paid for the education of the grandchildren were (1) if any should die before graduation from high school; (2) if any should fail to continue his or her education through school grades or if any of them should thereafter refuse to continue their education beyond high school grades; and (3) "that said grandchild does not intend to take advantage of the *bequests* herein made". The instrument then provided that in the event of the happening of any of the above contingencies the trustee was to "pay for the educations" of each of said remaining grandchildren, dividing the same equally between them until the said fund secured "has been *entirely exhausted.*" (Italics ours.)

It is apparent that none of the contingencies specified has happened. Each beneficiary has secured a college education. The testator provided for a life estate for her husband and then provided that her home be sold after his death; that from the proceeds $1,000 was to be paid to appellant and the remainder was to be paid by the trustee for the education of each grandchild until "said portions have been exhausted". It might rightfully be inferred that the trustee was directed to pay said sums directly to the beneficiaries, since no other payee was named.

The testatrix did not provide any period of time or any age at which said grandchildren should be paid for their education. Appellant is not a remainderman under the trust, but is a residuary legatee under the will and received a specific legacy. The testator did not indicate that the payments must be made concurrently with the obtaining of the education or that payment should be made only if, at the time of the death of the life tenant, the beneficiaries of the trust have not commenced or are still pursuing their college educations.

[2] Taking the will by its four corners and reading it with the view of ascertaining the intent of the testator, it might reasonably be construed that the testatrix meant to pay for the grandchildren's college education from the funds created for that purpose if they desired to take "advantage of that bequest"; that although the fund was being accumulated for this purpose, it was not payable until the death of the life tenant; that although the grandchildren might be called upon to finance their own college education, if they did care to comply with the provisions of the trust and obtain it, they were to be paid the sums due under its provisions, even though their college education had been obtained prior to the time of the happening of the contingency which would make it payable. The trial court so construed the instrument. We believe that

such construction is reasonable and according to the intent expressed in the will.

Order affirmed.

BARNARD, P. J., concurs.

113 Cal.App.2d 751

BENEDICT HEIGHTS, Inc. v. GERMON et al.

Civ. 18764.

District Court of Appeal, Second District, Division 3, California.

Oct. 21, 1952.

Rehearing Denied Nov. 6, 1952.

Hearing Denied Dec. 19, 1952.

Action by corporation against, inter alia, certain of its officers and directors alleged to have realized secret profits and to have defrauded corporation. The Superior Court, Los Angeles County, Otto J. Emme, J., rendered judgment for plaintiff, and certain of the defendants appealed. The District Court of Appeal, Parker Wood, J., held that the findings would not support the judgment for $36,000.

Reversed.

1. Corporations 🔑319(8)

Findings would not sustain $36,000 judgment against officers and directors alleged to have made secret profits and to have defrauded plaintiff corporation. Corporations Code, §§ 2200, 3001, 3006; Business and Professions Code, § 11010 et seq.; Gen.Laws, Act 3814.

2. Corporations 🔑520

Where action was commenced by corporation at time when its corporate powers were suspended for failure to pay franchise tax, action should have been dismissed, even though counsel for corporation announced in court that delinquent tax and penalty had been paid, where a certificate of revivor or restoration of corporate powers was not offered or received in evidence. Corporations Code, §§ 5905, 5908.

Cletus J. Hanifin, Los Angeles, for appellants.

Joseph W. Fairfield, Los Angeles, and Ethelyn P. Black, Los Angeles, for respondents.

PARKER WOOD, Justice.

In the complaint it is alleged that the defendants, except William McClean and the Santa Monica Escrow Company, were officers and directors of plaintiff corporation from the time of incorporation on January 19, 1948, to March 6, 1950; while said defendants occupied such positions they received $41,500 on behalf of the corporation; all the defendants conspired among themselves to defraud the plaintiff corporation of its assets; the defendants so manipulated the assets that the funds of the corporation came into their hands, and they, without right or authority, appropriated said funds to their own use; many of the records and books pertaining to said transactions were spirited away from plaintiff; plaintiff had no knowledge of said wrongs until about March 1, 1950; the acts of the defendants were wanton and malicious. Plaintiff asked for judgment for $41,500 and for punitive damages.

Plaintiff dismissed the action as to the escrow company. The other defendants answered and denied said allegations.

The court found that the defendants Mary Germon, Louis Germon, Mathew McClean, Sr., and John Ladislaus were directors of plaintiff corporation upon its incorporation, and that defendants Mary Germon, Louis Germon, and McClean, Sr., were officers of the corporation, and that these defendants continued as officers and directors until March 3, 1950; that about March 3, 1950, Joe Davis, Vid Rosner, Miriam Benjamin, George Fatland, and Charles Stanton were duly elected as directors of plaintiff and since that time were de facto directors of plaintiff and had authority to act in that capacity; that defendants Mary Germon, Louis Germon, McClean, Sr., John Marzicola, and G. A. Ladislaus, while officers and directors of plaintiff and in control of the board of directors conspired among themselves and with defendant William McClean to defraud plaintiff corporation of its assets for their own benefit, and in connection therewith committed the following acts: (a) failed to keep correct account of the papers and transactions of plaintiff as required by section 3001 of the Corporations Code; (b) failed to cause an annual report to be sent to the shareholders as required by section 3006 of the Corporations Code; (c) failed to call meetings of the shareholders as provided in section 2200 of the Corporations Code, in the by-laws; (d) failed to comply with section 11010 et seq. of the Business and Professions Code; that defendant Mary Germon, while using the name "Mary Ellen Anderson" purchased under the name of Mary Ellen Anderson 60 acres in Benedict Canyon for $22,500, and said purchase price was paid by the corporation herein; that defendant Mary Germon sold 30 acres of said tract, known as the Benedict Heights Tract, to defendant William McClean for $30,000, who in turn sold said tract to plaintiff for $30,000, and 26 acres to "Flintridge Heights" for $26,000, and retained for themselves the balance of approximately 10 acres valued at $9,000, thereby causing the defendants Mary Germon and William McClean to make a secret profit at the expense of the plaintiff; that the acts of said defendants in making such secret profit were wanton and malicious, and plaintiff is entitled to punitive damages; that defendants Mary Germon, Louis Germon, McClean, Sr., Marzicola, and Ladislaus, as officers and directors of plaintiff, and William McClean, received on behalf of plaintiff corporation $44,000 from the sale of shares of stock of plaintiff corporation; that said defendants are unable to account to plaintiff for said sum received by them and have made secret profits at the expense of plaintiff and as a result thereof plaintiff corporation has been damaged in the sum of $36,000; that defendants are holders of shares of stock in the plaintiff corporation as follows: Mary Germon 3 shares, Louis Germon 10 shares, McClean, Sr., 1 share, Marzicola 2 shares, Ladislaus 1 share, William McClean 1 share.

Judgment was for plaintiff for $36,000; and for punitive damages in the sum of $5,000 against defendants Mary B. Germon and William McClean.

Defendant Mathew McClean, Sr., is the father of defendants Bertha Germon and William McClean, Jr. They are real estate brokers, conducting business under the name of M. G. M. Realty Company. Defendant Louis Germon is the husband of Bertha. Defendant Ladislaus is a real estate broker with the M. G. M. Realty Company. Defendant Marzicola is a real estate broker and a contractor.

Prior to December 22, 1947, Mr. and Mrs. Hodson owned approximately 64 acres of land in Benedict Canyon, which land was subject to a trust deed for $15,000. On December 22, 1947, they sold said land, subject to said trust deed, to "Mary Ellen Anderson" for $7,500. She divided the land into three areas as follows: an upper area, consisting of approximately 26 acres, known as the "Beverly Tract"; a middle area, of approximately 33 acres, known as the "Benedict Heights Tract"; and a lower area, of approximately 5 acres, known as the "Five Acres." On December 23, 1947, "Mary Ellen Anderson" and defendant William McClean entered into an escrow agreement whereby said Anderson sold said middle area (33 acres) to said McClean or his nominee for $30,000, which sum was to be paid through escrow. The plaintiff Benedict Heights, Inc., was incorporated on January 16, 1948, and all the defendants, with the exception of William McClean, were the original directors. William McClean sold said property to Benedict Heights, Inc., the plaintiff herein for $30,000. On February 18, 1948, defendant William McClean instructed the escrow holder to vest title to said land (33 acres) in said Benedict Heights, Inc. Later, he instructed the escrow holder to pay the $15,000 trust deed from money due him from that corporation (the plaintiff). The amount due on the trust deed was paid through escrow. William McClean filed in the escrow a statement that he had been paid in full outside of escrow. On May 27, 1948, Anderson filed in the escrow a statement to the effect that she had received, outside of escrow, all the money due to her from Benedict Heights, Inc. On April 15, 1948, "Mary Ellen Anderson" executed a grant deed which recited that she granted said middle area (33 acres) to Benedict Heights, Inc.

The "Mary Ellen Anderson," referred to in said transactions, was the same person as defendant Bertha Germon—said defendant used the fictitious name, "Mary Ellen Anderson," in buying and selling said property. It appears that defendant Bertha Germon wrote the signature "Mary Ellen Anderson" on the escrow instructions and the grant deed in such a manner and form that the writing was a disguise of her own usual handwriting and was intended to create the impression that "Mary Ellen Anderson" was a person other than defendant Bertha Germon. On another occasion and in a different deed purportedly made by "Mary Ellen Anderson," the defendant Bertha Germon, as a notary public, attested that said Anderson appeared before her and acknowledged that she executed the deed. In an identification statement of "Mary Ellen Anderson," which defendant Bertha Germon prepared and furnished to a title insurance company, she (defendant Bertha Germon) falsely stated that Anderson was a single person, a retired nurse, and that she resided at a certain address.

The Beverly Tract or upper part of the 64 acres was retained by Bertha Germon (under the name Mary Ellen Anderson), and later she sold said upper part to "Flintridge Heights" for $26,000. She deeded the lower part or the "Five Acres" to William McClean. Said McClean deeded ¼ of the five acres to defendant Marzicola, for his services in investigating prices for improvements on the Benedict Heights Tract. He also deeded ¼ of the five acres to each of three other persons (McClung, Diez, and Stanke).

Benedict Heights, Inc., intended to subdivide the Benedict Heights Tract, but its subdivision plans were not approved by all the governmental agencies whose approval was required.

Soon after Bertha Germon purchased the 64 acres and before she sold the Benedict Heights Tract to William McClean, they (Bertha and William) prepared a proposed form of agreement which was titled "Subscription Agreement Before Incorporation." The agreement stated that it was proposed that the corporation (Benedict Heights, Inc.) which was to be formed should issue 100 shares of stock of the par value of $500 each, and that the corporation should carry on a business of buying, developing and selling the real property known as the Benedict Heights Tract. After the corporation was formed, Bertha Germon and William McClean placed advertisements in newspapers regarding the subscription agreement, and as a result thereof various persons entered into said agreement and paid to the corporation $500 per share for 86 shares, or a total of $43,000. A permit for the sale of such shares had not been issued by the corporation commissioner.

There was evidence, on behalf of defendants, that each subscriber for a share was told that $30,000, of the $50,000 to be obtained for the shares, would be used to buy the Benedict Heights Tract and that $20,000 would be used to subdivide and improve the property. There was evidence, on behalf of defendants, to the effect that $14,300 was paid for engineering, grading, and other kinds of improvement work on the Benedict Heights Tract.

Also, there was evidence to the effect that on March 3, 1950, new directors of plaintiff corporation were elected. The new directors caused the present action (against the original directors and Wm. McClean) to be commenced.

At the time the action was commenced, the plaintiff corporation was delinquent in the payment of its franchise tax, and at said time, due to such delinquency, its corporate powers had been suspended. During the trial, the attorney for plaintiffs stated that the delinquent tax, and the penalty for such delinquency, had been paid after the trial was commenced.

Appellants (defendants) contend (1) that since the corporate powers of plaintiff had been suspended at the time the action was commenced, the action should have been dismissed; (2) that the finding that defendants conspired to defraud plaintiff is not supported by the evidence; (3) that even if the defendants who were directors failed to keep adequate books, or to send annual reports to the stockholders, or to comply with any section of the codes, such failure would not constitute fraud or a basis for a judgment for $36,000 damages or for a judgment for punitive damages; (4) and that the finding that plaintiff was damaged in the sum of $36,000 is not supported by the evidence.

[1] The trial court did not specify in the findings or at all the basis upon which damages in the sum of $36,000 were computed. There is a finding, as above shown, that defendants received $44,000 from the sale of stock, that they were unable to account to plaintiff for said sum and they made secret profits, and as a result thereof plaintiff was damaged in the sum of $36,000. It is undisputed that the corporation agreed to pay $30,000 for the Benedict Heights Tract, and that it received a grant deed to said property. There was no finding or evidence that the said tract was not of the value of $30,000, or that the grant deed was not valid. There was no finding that the corporation did not acquire title to said tract. If the corporation acquired title to said property, and if said property was of the value of $30,000, it would appear that the defendants had accounted, at least, for $30,000 of the amount received. Also, it is undisputed that the defendants caused some improvement work to be done upon the tract, and that some amounts were paid for that work. There was no finding as to the value of, or the amounts paid for, such work. If defendants paid any amount for such work, and if the amount so paid did not exceed the reasonable value of such work, it would appear that the defendants should be credited further with the amount so paid. If defendants were entitled to such credits ($30,000 and amounts paid for improvements), then of course the balance due in an accounting for the $44,000 would be much less than $36,000. The findings were not adequate to show a basis for measuring damages in the sum of $36,000.

With respect to making a secret profit, the findings do not specify the basis upon which it was determined that there was such a profit. There is a finding, as above shown, to the effect that defendant Bertha Germon sold the upper area of 26 acres (Beverly Tract) to Flintridge Heights for $26,000, and "retained the balance of approximately 10 acres [presumably the lower area] valued at $9,000.00 for themselves; thereby causing" the defendants Bertha Germon and William McClean "to make a secret profit for themselves." It is indicated by said finding that the trial judge was of the opinion that Bertha Germon, as a prospective director or officer of the corporation to be formed, was under a duty to sell to the corporation all the Benedict Canyon land (which she had purchased from the Hodsons) for $30,000 or for the amount she paid for it. In other words, that finding indicates that the trial judge was of the opinion that she was not entitled to sell to the corporation the middle area only (Benedict Heights Tract) and to retain the upper and lower areas. The findings were inadequate to show a basis for secret profits. It does appear that the defendant Bertha Germon attempted, by the use of a fictitious name and by false statements as to her identity, to deceive persons who participated in the transactions involving the Benedict Canyon property. It also appears that the sales of shares of stock were in violation of the Corporate Securities Act. Gen.Laws Act 3814. Such deceit and violation of the act, however, are not sufficient to constitute a basis for the award of damages herein. The findings as to damages are too general and indefinite to support the judgment.

[2] A further contention of appellants, as above stated, is that since the corporate powers of plaintiff had been suspended at the time the action was commenced (for failure to pay its franchise tax), the action should have been dismissed. Appellant argues that the act of the corporation in commencing this action, during the period when its corporate powers were suspended, was a void act and that payment of the delinquent taxes after the action had been commenced would not have the effect of validating the acts attempted during the period of suspension. Appellants' motion to amend their answer to allege that plaintiff's corporate powers had been suspended should have been granted. There was no competent evidence that the corporate powers had been reinstated. Counsel for plaintiff announced in court that the delinquent tax and penalty had been paid after the

trial had commenced. Section 5905 of the Corporations Code provides: "Any corporation * * * whose charter * * * has been forfeited for nonpayment of any license tax * * * may be relieved of the forfeiture upon * * * payment of * * the license tax due under the Corporation License Act, upon issue by the State Controller of a certificate of revivor to the corporation." Section 5908 of the Corporations Code provides: "A corporation is revived and its powers restored to full force and effect, pursuant to Section 5905, when the State Controller issues his certificate, but the revivor is without prejudice to any action or proceeding * * * which has occurred by reason of the original forfeiture." A certificate of revivor or restoration of corporate powers was not offered or received in evidence.

By reason of the above conclusions it is not necessary to determine other contentions of appellants.

The judgment is reversed. The purported appeal from the order denying motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

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113 Cal.App.2d 729

SHEETER et ux. v. LIFUR et al.

Civ. 18950.

District Court of Appeal, Second District,
Division 2, California.
Oct. 20, 1952.

A husband and wife brought an action against a railroad company and others to quiet title to realty and for order requiring defendant railroad to vacate involved realty, over a portion of which tracks belonging to defendant railroad were laid, with remaining portion being used to maintain right of way of defendant railroad, and defendant railroad filed a cross-complaint. A default was entered as to all defendants other than defendant railroad. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., rendered a judgment adverse to plaintiffs and plaintiffs appealed. The District Court of Appeal, Fox, J., held that evidence sustained finding that land which plaintiffs purchased at tax sale was not a separate parcel not within defendant's right of way.

Judgment affirmed.

1. Appeal and Error 🔑931(1), 1010(1)

A reviewing court will uphold findings based on substantial evidence, resolving conflicts in evidence in favor of prevailing party and drawing all reasonable inferences in support of findings.

2. Quieting Title 🔑10(1)

In suit to quiet title plaintiff may recover only upon strength of his own title and not upon weakness of defendant's title.

3. Taxation 🔑810(3)

In action against railroad to quiet title to realty which defendant claimed as being part of right of way granted to defendant by Congressional Act, evidence sustained finding that land which plaintiffs purchased at tax sale was not a separate parcel not within defendant's right of way.

4. Taxation 🔑734(1)

Unless there is in fact a delinquency a sale of realty by tax collector is unauthorized and void, and tax deed given in pursuance of such sale conveys no title.

5. Appeal and Error 🔑991

In action by holders of tax deed to quiet title to realty which defendant railroad claimed as being part of right of way granted to defendant by Congressional Act, whether prima facie case made by plaintiffs by introduction of tax deed was satisfactorily rebutted was fact question for trial court.

6. Taxation 🔑530

Where there are two assessments of the same land to different persons for same year the payment of taxes by one under his assessment discharges lien for taxes, and no collection under the other assessment can be made because state is entitled to only one payment.

7. Taxation 🔑623

If there are two sufficient assessments of land and taxes due thereon are paid under either, the land cannot be validly sold for taxes under the other.

8. Constitutional Law ⚷311

A statute purporting to make a tax deed conclusive evidence of title, and thereby preclude owner from showing its invalidity because of a jurisdictional vice, would amount to an unconstitutional confiscation of property.

9. Taxation ⚷810(3)

In action by holders of tax deed to quiet title to realty which defendant railroad claimed as being part of right of way granted to defendant by Congressional Act, evidence justified conclusion that defendant paid taxes to state on defendant's operative property pursuant to statute and that such property included property which plaintiffs claimed to have acquired under a tax deed. Political Code, §§ 3664–3671d.

10. Taxation ⚷805(4)

Generally where original owner of land which has been sold for taxes remains in undisturbed possession of such land, statute of limitations does not run against him nor prevent maintenance of a suit by him to set aside tax deed or remove cloud on his title.

11. Limitation of Actions ⚷182(5)

If a statute of limitation is not pleaded, it is waived regardless of whether it is a general statute of limitation or one relating to a special proceeding.

12. Limitation of Actions ⚷182(5)

Where plaintiffs in quiet title action failed to plead allegedly applicable statute of limitations in their answer to defendant's cross-complaint, plaintiffs could not urge such statute of limitations on appeal from judgment adverse to plaintiffs. Revenue and Taxation Code, §§ 175, 3521, 3725.

13. Taxation ⚷810(2)

In action by holders of tax deed to quiet title to realty which defendant railroad claimed as being part of right of way granted to defendant by Congressional Act, evidence relating to certain proceedings and events occurring prior to issuance of tax deeds and proof of tax payments made by defendant was admissible to establish defendant's claim to involved realty, to refute presumption of nonpayment of taxes by defendant, and to establish duplicate assessment of involved realty and consequent invalidity of plaintiff's tax deed.

14. Public Lands ⚷73

In action by holders of tax deed to quiet title to realty which defendant railroad claimed as being part of right of way granted to defendant by Congressional Act, evidence sustained finding that entire property involved was within defendant's right of way.

15. Property ⚷9

In action by holders of tax deed to quiet title to realty which defendant railroad claimed as being part of right of way granted to defendant by Congressional Act, wherein defendant filed cross-complaint, evidence justified trial court in bringing into play presumption in favor of defendant that a person is owner of property from exercising acts of ownership over it, or from common reputation of his ownership. Code Civ.Proc. § 1963, subd. 12.

16. Property ⚷9

Where defendant railroad in quiet title action was entitled under evidence to benefit of presumption that a person is owner of property from exercise of acts of ownership over it, or from common reputation of his ownership, such presumption remained in case for consideration and weighing by trier of facts notwithstanding plaintiffs introduced controverting evidence. Code Civ.Proc. § 1963, subd. 12.

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A. G. Van Deventer, Pasadena, and Robert G. Bereman, Los Angeles, for appellants.

C. W. Cornell, E. D. Yeomans, R. P. Reddingius, Los Angeles, for respondent.

FOX, Justice.

Plaintiffs, who are husband and wife, brought a suit against defendants John and Gregory Lifur, Frances Olhasso and the Southern Pacific Railroad Company to quiet title to a designated parcel of property, praying also that defendant Southern Pacific Railroad Company be ordered to vacate the said premises, over a portion of which its tracks were laid and the rest used for purposes of maintaining its right of way. Defaults were entered as to all defendants other than the Southern Pacific Railroad Company, which filed an answer denying all of the material allegations of the complaint and interposing several affirmative defenses. Simultaneously, the Southern Pacific Railroad Company (hereinafter denominated defendant) filed a cross-complaint praying that title to the property in issue be quieted in it and that plaintiffs be enjoined from asserting any claims adverse to it in the said land. Plaintiffs take this appeal from a judgment quieting title in defendant on its cross-complaint and denying the relief prayed for in plaintiffs' complaint.

The real property in dispute consists of a curving wedge of land approximately 40 to 44 feet wide and 471 feet long, allegedly located between the southerly line of operative property owned by defendant and the northerly line of a strip of property known as Lot B of the Lifur tract. Topographically examined, the property in issue consists in part of a level area along which is laid trackage used by defendant, the rest being a bluff about 35 feet high, enclosed by a fence along its southerly side where it is contiguous with Lot B of the Lifur tract. The record indicates that this fence was erected in 1915 by defendant and has been continuously maintained by it.

Plaintiffs' claim to this property is derived from a tax deed, based upon the failure of Martin Lifur and Bernard J. Olhasso to pay taxes assessed to them in 1930. This nonpayment culminated in a tax sale to the State in 1931, a deed to the State in 1936, and a tax deed to plaintiffs executed by the Tax Collector of Los Angeles County on August 2, 1948. Defendant contends that this strip of land has been its property since its original line was built in 1874 under the authority of a Congressional Act of March 3, 1871, 16 Stat. 573, granting to defendant a right of way 200 feet wide (100 feet on each side of the center line of the railroad as originally constructed) where such railroad right of way passed through the public domain.

The record indicates that pursuant to this Congressional enactment, defendant filed a map of its proposed route with the Land Office in Washington and proceeded to construct its line within the boundaries of the purported federal grant, although no evidence appears in the record to establish that the 200 foot right of way traversed by the line was actually situated on land in the public domain. From defendant's exhibit B it appears that a deed was obtained from one Catalina Batz in 1877, conveying to defendant a strip of property 100 feet wide (50 feet on either side of the track which was already laid pursuant to the claimed federal grant, and within its purported boundary lines). The Batz deed itself was not produced in evidence. In 1895, in order to smooth out the curving track, defendant relocated its tracks approximately 50 feet to the south, leaving them still within the area claimed under the land grant and at about the line shown on exhibit B as the southern extremity of the grant from Catalina Batz. In 1905 defendant obtained a deed from one Martin Lifur, conveying to it 2.798 acres of land. So far as it is here pertinent, the exhibit discloses that this conveyance, starting at approximately the point where defendant's original track was located, deeded to defendant a parcel of land extending 150 feet in a northerly direction, thus overlapping by about 50 feet in width the conveyance presumably made by Catalina Batz. This deed also included a strip about 50 feet wide up to the northerly rim of the claimed congressional grant and continued to a point fifty feet beyond, contiguous with the southeasterly line of an area identified as Lot C, Lifur tract. By this northerly addition to the property claimed under the congressional grant, defendant's right of way was increased to a width of 250 feet, with the property here involved located at the southern side, adjacent to Lot B of the Lifur tract.

In 1906 Martin Lifur, apparently the successor to the Batz interests in the area under discussion, filed with the County Recorder a subdivision map showing the location of his property. This map discloses that a 250 foot wide strip of land, located between Lots B and C of the Lifur tract, and including the section of land here claimed by plaintiff, is expressly designated as a part of defendant's right of way and disclaimed as a part of the Lifur properties which surrounded it. In 1915 defendant built a fence along the bluff contiguous to Lot B, enclosing the area now claimed by plaintiff, and has ever since maintained the fence on this claimed boundary line.

On November 8, 1910, an amendment to the State Constitution, Article XIII, section 14, Stats.1911, p. xliv, was adopted providing for a new method of taxation by the State upon the operative property of certain categories of corporations, including railroads, based upon percentages of gross receipts, these taxes being "entirely and exclusively for state purposes". Under section 14(a) it is stated that "Such taxes shall be in lieu of all other taxes and licenses, state, county and muncipal, upon the property above enumerated of such companies except as otherwise in this section provided * * *." Legislation to implement the constitutional provision was enacted in 1911, and statutes relating to this method of taxation incorporated in the Political Code by Statutes of 1917, p. 337, Pol.Code, secs. 3664 to 3671d. Article XIII, section 14, was further amended June 27, 1933, to provide for local *ad valorem* taxation of property belonging to railroad corporations, effective January 1, 1935.

Evidence was introduced to establish that of the 250 foot wide right of way claimed by defendant, the strip 165 feet wide starting from the northern line of Lot B, Lifur tract, was classified as operative property and the remaining 85 feet, extending to the line of contact with Lot C, Lifur tract, was described as nonoperative property. According to a certified statement from Dixwell L. Pierce, secretary of the State Board of Equalization and custodian of the records of that board, the records of the board for the years 1929 and 1930 showed that a description of the property owned by defendant was filed by defendant. The certificate further states that pursuant to the requirements of Political Code section 3665c, the State Board of Equalization classified and assessed the property therein described as defendant's operative property for 1929 and 1930. It further states that the assessment was on a strip of land used as a right of way not exceeding 10 rods (165 feet) and that in conformity with said assessment defendant paid the gross receipts taxes for 1929 and 1930. Mr. Pierce stated, however, that the maps filed with the State Board of Equalization showing the property on which taxes were paid to the State prior to 1935 had been destroyed. Other testimony, both oral and documentary, was adduced to show the division of the defendant's 250 foot wide property into 85 feet nonoperative property and the 165 foot operative property which was taxed under the gross receipts tax in the year 1930, and which was assessed for flood control purposes in 1930. Evidence was received that the land here in dispute was a part of this operative property.

To cover the years subsequent to January 1, 1935, when the taxation system was changed to an *ad valorem* basis paid to local tax authorities pursuant to assessments made by the State Board of Equalization, defendant placed in evidence two maps which it had filed with the State Board of Equalization showing the railroad property on which assessments were made, and receipts showing taxes had been paid, for the period covering July 1, 1935, to June 30, 1950. These maps show the property in issue to be within defendant's operative property and on one of them defendant's fence enclosing this property is shown on the southerly perimeter of defendant's right of way, contiguous with the northerly part of Lot B, Lifur tract, which substantially corresponds with the southerly boundary of the disputed property.

Plaintiff introduced into evidence two pages from the County Assessor's official map book, one of which was in use for assessment of taxes prior to 1926, and the other, a resurvey of the area, including the property here in dispute, in use from 1926 to 1935. These surveys purport to show that the property here in dispute is distinct from the property included in the defendant's right of way, and is in effect a parcel belonging to Lifur who is the assessee along with Olhasso. Another witness testified that defendant's receipted tax bill for 1930 covering the property later sold for delinquent taxes, relates only to a special assessment for flood control.

On this state of the record the court found, in part, that defendant "entered into actual possession of all the land and premises described in the complaint * * * in the year 1895, claiming it in its own right, and * * * has ever since * * * occupied said land as a part of its right of way for purposes of maintenance and operation of its * * * railroad, and that all said property has been used continuously since said date and is necessary for said railroad right of way, and that said property has been enclosed by a substantial fence continuously since prior to the year 1915, which fence was erected and maintained by said defendant." A finding was also made that neither plaintiffs nor any predecessor in interest has been in possession since 1895, and that defendant first entered upon the premises "under claim of right and not as a trespasser against the rights of * * * plaintiffs, or any of those under or through whom they claim."

[1, 2] Plaintiffs attack the court's determination that they do not have valid title to the property involved here and its judgment in defendant's favor upon several grounds, the first being that the findings are unsupported by the evidence. This argument is untenable when considered in the light of the rule that a reviewing court will uphold findings based on substantial evidence, resolving conflicts in the evidence in favor of the prevailing party, Van Amersfoort v. Young, 105 Cal.App.2d 22, 25, 232 P.2d 569, and drawing all reasonable inferences in support of the findings. Wilbur v. Wilbur, 197 Cal. 1, 7, 239 P. 332. In a suit to quiet title plaintiff may recover only upon the strength of his own title, and not upon the weakness of defendant's title. Helvey v. Sax, 38 Cal.2d 21, 237 P.2d 269; Tanner v. Title Insurance & Trust Company, 20 Cal. 2d 814, 825, 129 P.2d 383. A fundamental question presented to the trial court is whether the property to which plaintiffs' tax deed relates existed as a separate parcel outside defendant's right of way, as plaintiffs claim, and was assessable in 1930 to Lifur and Olhasso. The description which was used by the Los Angeles County Assessor which is contained in the tax deed to plaintiffs is as follows: "Lot com at most N cor Lot B Lifur property th N 40.24 ft to SE line SP RR R/W the SW on sd R/W to N line Sec 20 T1S R12W th E 44.36 ft to most W cor sd Lot B th NE on NW line thereof to beg. Part of Sec. 17 T1S R12W." This description pertains to a parcel of land about 40 feet wide, extending north of Lot B of the Lifur tract, and it is plaintiffs' claim that this property is located between Lot B of the Lifur tract and the 250 foot railroad right of way. Thus, plaintiffs are in effect claiming that the official map records on file with the County Recorder are erroneous since page 69 of Map Book 9 (defendant's exhibit C) shows that the 250 foot right of way and Lot B are contiguous.

[3] Plaintiffs rely upon a special survey made by H. E. Haenke and surveys made by the County Surveyor's Department to establish that the property they purchased at the tax sale is a separate parcel not within the defendant's right of way. These surveys are in conflict with defendant's exhibit C which is also an official map, and with other evidence as to the extent and location of defendant's right of way. A question of fact was thus addressed to the court as to which of the official records, in the light of the explanatory testimony, was entitled to be accepted as correct and accurate. This conflict was resolved adverse to plaintiffs. An examination of the record shows substantial evidentiary support for this determination and it is therefore binding on appeal. The maps and exhibits introduced by defendant give complete data as to the dimensions of the property in issue, and especially on the critical issue of the length of the section or base line from the common point of reference (the intersection of sections 17, 18, 19, 20) to the southeast corner of Lot B. All maps relating to Lot B uniformly give the dimension of its southern line as 419.83 feet. But the uncertainty is as to where this 419.83 feet is to be measured from, since this is crucial in determining whether there is a gap that would be accounted for by the property in dispute. None of the plaintiffs' maps show the entire distance from the point where sections 17, 18, 19, 20 intersect to the southeast corner of Lot B. There is thus no suf-

ficient basis for deciding whether plaintiffs' maps are correct. This is particularly important since comparison was required in the light of data contained in defendant's exhibit C, the recorded map of the Lifur property and the terms of the deed of conveyance by Martin Lifur to defendant in 1905. From this failure of plaintiffs' proof of the accuracy of the surveys relied upon by them the court could reasonably have drawn the inference that plaintiff bought a tract of land which had no independent existence, and was in fact included in defendant's operative property, upon which taxes were assessed and paid to the State in 1930 under gross receipts tax law.

[4, 5] Plaintiffs contend that the introduction of the tax deed established prima facie evidence of title in them, Luberco, Ltd., v. Boswell, 96 Cal.App.2d 946, 950, 217 P.2d 105, and also made out a prima facie case of nonpayment of taxes, Cooper v. Miller, 113 Cal. 238, 45 P. 325, thereby casting upon defendants the burden of proof as to payment of taxes. Whether plaintiffs' prima facie case was satisfactorily rebutted was a question of fact for the trial court to determine, Luberco, Ltd., v. Boswell, supra, and the record contains substantial evidence that the land here in issue was included in defendant's operative property on which it paid a gross receipts tax in 1930. Under the constitutional provision, Article XIII, section 14(a), such taxes were in lieu of all other taxes, making this property, in practical effect, exempt from additional assessments by the State or any of its subdivisions vested with taxing power. "Unless there was in fact a delinquency, a sale by the tax collector is unauthorized and void, and the tax deed given in pursuance of such sale conveys no title. (Citing case.)" Boyer v. Gelhaus, 19 Cal.App. 320, 323, 125 P. 916, 918.

[6, 7] Plaintiffs argue that their tax deed is conclusive evidence of the regularity of all proceedings from the levy of the assessment to the execution of the deed. This contention is based on section 3711 of the Revenue and Taxation Code, a curative statute (formerly Political Code, sec. 3836), which reads as follows: "Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive." However, defendant does not question the regularity of the proceedings leading to plaintiffs' deed. It is defendant's position that the tax deed to plaintiffs, which was based on an unpaid duplicate assessment to Lifur and Olhasso on property which the county had no authority to tax and on which taxes to the State were paid by defendant, is void and ineffectual against the defendant. The rule is thus stated in 61 C.J., Taxation, sec. 1226, p. 949. "Where there are two assessments of the same land to different persons for the same year, the payment of taxes by one under his assessment discharges the lien for taxes, and no collection under the other assessment can be made, because the state is entitled to only one payment." The same text also states the rule that "If there are two sufficient assessments of land and the taxes due thereon are paid under either, the land cannot be validly sold for taxes under the other." 61 C.J., Taxation, sec. 1522, p. 112.

[8, 9] From the evidence before the court, the conclusion could justifiably be drawn that defendant had paid taxes upon its operative property to the state and that this property included the tracks and adjoining property up to the fence which plaintiffs claim they acquired under the tax deed. In Churchill v. Kellstrom and Southern Pacific Railroad Company, 58 Cal.App.2d 84, 136 P.2d 602, plaintiff brought an action to quiet title against defendant Southern Pacific and others, claiming adverse possession for 20 years and payment of taxes as against the defendant who was also claiming by adverse possession and payment of taxes. The court states in 58 Cal.App.2d at page 87, 136 P.2d at page 604, "There is also evidence that the lot was included as part of defendants' operative property for the purpose of taxation * * *. We do not feel it necessary to determine the correctness of any assessments or payments of taxes made herein, for there is ample evidence of payment by both parties. However, if the property were properly a part of the measure of defendants' gross receipts tax it was exempt from further taxation (citing cases) and plaintiff's payment of county or other taxes would be immaterial (citing cases)." Thus it is apparent that the irregularity here attacked is not one of mere procedural routine which the Legislature could properly have cured by a validating act, Bell v. Towns, 95 Cal.App.2d 398, 213 P.2d 73, and for which provision is made in section 3711 of the Revenue and Taxation Code as well as by the validating acts of 1943 and 1945, Stats.1943, ch. 458, p. 1993; Stats.1945, ch. 1134, p. 2176; 3 Deering's Gen.Laws, Acts 8443, 8443a, but is jurisdictional in nature to which a curative act is inapplicable. Elbert, Ltd., v. Nolan, 87 Cal.App.2d 24, 30, 196 P.2d 88. A statute purporting to make a tax deed conclusive evidence of title, and thereby preclude the owner from showing its invalidity because of a jurisdictional vice, would amount to an unconstitutional confiscation of property. Ramish v. Hartwell, 126 Cal. 443, 448–449, 58 P. 920. But no such meaning or interpretation has been placed on section 3711 by the courts. DeFlon v. Van Lue, 83 Cal.App.2d 288, 290, 188 P.2d 301. Defendant was free, therefore, to proceed to show that the property in issue was part of its operative property, and that all duly assessed taxes were paid.

[10–12] Plaintiffs assert that regardless of any constitutional restraint upon the Legislature to remedy defects in tax proceedings by validating acts, defendant's attempt to show the invalidity of the tax sale and the resultant tax deed is barred by the periods of limitation embodied in sections 175 [1], 3725 [2] and 3521 [3] of the Revenue and Taxation Code. All of these sections are statutes of limitation. People v. Chambers, 37 Cal.2d 552, 558, 233 P.2d 557. It appears to be the general rule that where the original owner of land which has been sold for taxes remains in the undisturbed possession of said property, then a statute of limitation does not run against him, nor prevent the maintenance of a suit by him to set aside the tax deed or remove the cloud on his title. See Tannhauser v. Adams, 31 Cal.2d 169, 175, 187 P.2d 716, 5 A.L.R.2d 1015; McCaslin v. Hamblen, 37 Cal.2d 196, 199, 231 P.2d 1; McKenna v. Ping, 105 Cal.App.2d 752, 755, 234 P.2d 246; 34 Am.Jur., p. 29, sec. 20; p. 296, sec. 381; 61 C.J., p. 1418, sec. 2026; p. 1423, sec. 2031. The rationale of this rule is that an owner, because of his possession, could not be assumed to have actual knowledge of claims of adverse interest by persons not in possession. McCaslin v. Hamblen, supra. However, it is not necessary for us to decide this question because of the established rule that if a statute of limitation is not pleaded it is waived, whether it be a general statute of limitation or one relating to a special proceeding. 16 Cal.Jur. 603–604. Since plaintiffs failed to plead any of these limitation provisions in their answer to the cross-complaint, they are not in a position to now urge them. Hall v. Chamberlain, 31 Cal.2d 673, 679–680, 192 P.2d 759; Merchants Finance Corp. v. Mahomed, 82 Cal.App.2d 649, 653, 187 P.2d 39.

[13] Plaintiffs argue that the court committed prejudicial error in its rulings upon objections to the introduction of evidence relating to certain proceedings and events occurring prior to the issuance of the tax deeds and in admitting proof of various tax

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[1] Section 175, enacted in 1945, provides that "All deeds heretofore and hereafter issued to the State of California * * * by reason of delinquency of property taxes * * * levied by any taxing agency * * * shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later."

[2] Section 3725 provides: "A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter can only be commenced within one year after the date of execution of the tax collector's deed."

[3] Section 3521 provides: "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later."

payments made by defendant. This evidence was correctly admitted to establish defendant's claim to the property in issue, to refute the presumption of nonpayment of taxes, and to establish the duplicate assessment and the consequent invalidity of the tax deed. There is no merit to plaintiffs' contention that certain exhibits were received without proper foundation or authorization being established or that they were immaterial to the issues of the case, and plaintiffs' motion to strike them from the record was properly denied.

[14–16] Plaintiffs' final argument attacks the court's finding that the entire property in dispute was within the defendant's right of way as being against the evidence. However, an examination of the testimony reveals abundant support for this finding. The record indicates that defendant entered upon the property in question under a claimed Congressional grant, constructed a railline in 1874, shifted its tracks in 1895, erected its fence in 1915, and has been in uninterrupted possession at all times. Under these circumstances, the court was justified in bringing into play the presumption "that a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership". Code Civ.Proc. § 1963, subd. 12. Even though plaintiffs introduced controverting evidence, the presumption remained in the case for consideration and weighing by the trier of the facts. Estate of Kennedy, 106 Cal.App.2d 621, 627, 235 P.2d 837. Furthermore, the court had before it the subdivision map filed by Martin Lifur in 1906 indicating that the defendant had a 250 foot right of way between Lot B and Lot C of the Lifur tract, as well as evidence of the construction of a fence by defendant enclosing the area now in dispute. From this the court could have reasonably inferred that any uncertainty as to the boundary line between defendant's right of way and Lot B growing out of the Congressional grant and earlier conveyances by Batz and Lifur was thus resolved by parol agreement of a practical location and by long acquiescence therein. Mello v. Weaver, 36 Cal.2d 456, 459–460, 224 P.2d 691. Finally, there was evidence before the court that the land was a part of defendant's operative property which was used as a measure for the payment of the gross receipts tax for 1930, thus rendering it immune from local taxation. We cannot, therefore, say as a matter of law that the evidence is insufficient to support the findings.

Since the foregoing discussion disposes of the essential issues involved herein, it is unnecessary to consider other questions raised by counsel in their briefs.

Judgment affirmed.

McCOMB, Acting P. J., concurs.

114 Cal.App.2d 14

PEOPLE v. LANG.

Cr. 4873.

District Court of Appeal, Second District,
Division 3, California.
Oct. 31, 1952.

An accused was convicted in the Superior Court of Los Angeles, William B. Neeley, J., of robbery in the second degree and of attempted robbery and he appealed from the judgment and from order denying a new trial. The District Court of Appeal, Shinn, P. J., held that evidence justified conviction.

Judgment and order affirmed.

1. Robbery 🔑24(1)

Evidence justified conviction for robbery in the second degree and for attempted robbery.

2. Criminal Law 🔑570(1)

Evidence justified finding that a defendant charged with robbery in the second degree and with attempted robbery was sane when charged crimes were committed. Pen.Code, § 1027.

3. Criminal Law 🔑1104(3)

Where discussions which took place at time of arraignment of defendant and in connection with proceedings preliminary to trial upon defendant's pleas of not guilty and not guilty by reason of insanity, and voir dire examination of jurors and oral arguments to jury, were not shown to be material, trial court properly denied defendant's motion to have record of such matters included in transcript on appeal from conviction for robbery in the second degree and for attempted robbery.

Warren White, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant was convicted in a jury trial of robbery in the second degree and attempted robbery. Upon trial of his plea of not guilty by reason of insanity to a jury he was found sane. He was also found to have suffered a prior conviction for which he had served a term in prison. He made a motion for a new trial, which was denied and he appeals from the judgment and order.

[1] Upon application of appellant this court appointed Warren White, Esq., member of the Los Angeles Bar Association Committee on Criminal Appeals, to represent appellant and to report to the Court whether, in his opinion, the record discloses any meritorious ground of appeal, see People v. Dodd, Cal.App., 248 P.2d 965. A report has been received which summarizes the case on appeal and expresses counsel's opinion that no meritorious ground of appeal exists. From our independent study of the record the following facts appear: Defendant was accused of robbing Geraldine R. Dugan, a Western Union clerk, of $29. The robbery took place in the office of the company at about 3:00 o'clock p. m.; defendant had his right hand in his coat pocket and said: "This is a stick-up," and demanded money, which was given to him; Mrs. Dugan later identified the defendant in a lineup of prisoners at the county jail three or four days after the robbery. Upon cross examination she testified at length as to the characteristics of defendant which enabled her to identify him. There was no uncertainty in her identification. Raymond A. Neville, a night clerk at the Embassy Hotel, in Los Angeles, testified that at about 1:00 o'clock a. m. the defendant appeared at the office of the hotel, put his hand in his right pocket and said: "This is a stick-up. Give me your money." Neville picked up a metal stapling machine, pointed it at the defendant and said: "You beat it or I will blow your brains out," whereupon defendant ran out and Neville followed him. About ten minutes later defendant was arrested, brought back to the hotel and was identified by Neville. There was no uncertainty in Neville's identification. Defendant was arrested three or four blocks from the Embassy Hotel. One of the arresting officers testified that defendant said he did not use a gun, but that he put his wallet in his right front coat pocket and made it simulate a gun. Defendant had a wallet in his right coat pocket. Defendant testified that he had no clear recollection of what he had been doing when the Western Union office was robbed, although he denied having been in that office. He admitted having been at the Embassy Hotel, claimed that he had taken two drinks in the lobby of the hotel, and that he "came to" several blocks away in a filling station, where he was arrested. He admitted having run away from the hotel when the clerk came toward him with what he thought was a gun. He testified that he was employed at that time as a mixer of paint and lacquer and was not in need of money. The evidence was legally sufficient to justify the verdicts of guilty.

There were no errors in the receipt or exclusion of evidence. When the case was called for trial defendant had no attorney, the court appointed an experienced member of the bar to represent him and granted a continuance of several weeks to enable the attorney to familiarize himself with the case. Later, when the case was again called for trial, defendant discharged his attorney and insisted upon representing himself. The trial judge exhibited the utmost solicitude for the rights of defendant and upon innumerable occasions assisted him in the conduct of his defense. Defendant was repeatedly told that he should have an attorney but was determined to represent himself. He was allowed wide latitude in giving his testimony and in cross examining witnesses. His trial was eminently fair in every respect.

[2] Pursuant to § 1027 of the Penal Code the court appointed three physicians to examine the defendant as to his sanity and report to the court as to his mental condition. At that time defendant was represented by an attorney. It was stipulated that if two of the doctors examined the defendant the third need not examine him. Dr. Edwin E. McNiel testified in the trial of the plea of insanity he had examined defendant and that in his opinion defendant was legally sane when the offenses were committed and at the time of his examination. The written report of Dr. Clarence W. Olson was introduced in evidence under stipulation. In a comprehensive report Dr. Olson gave as his opinion that defendant was sane at the time of the commission of the offense and at the time of trial. Other than the testimony of Dr. McNiel and the report of Dr. Olson, there was no evidence on the insanity issue except the testimony of the defendant. There was ample evidence to support the findings of the jury that defendant was sane.

[3] Defendant made a motion in the trial court for the inclusion of the record of other proceedings in the transcript on appeal. It appears from the record that he desired to have included discussions which took place at the time of his arraignment and in connection with all proceedings preliminary to the trial upon the pleas of not guilty and not guilty by reason of insanity, as well as the voir dire examination of the jurors and the oral arguments to the jury. There was no showing whatever of the materiality of any of the matters sought to be incorporated in the record. The court denied the motion and in doing so committed no abuse of discretion.

Defendant was given an eminently fair trial. His rights were fully protected and his appeal is without merit.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

In re TALMAGE'S ESTATE.

Civ. 8201.

District Court of Appeal, Third District, California.

Oct. 31, 1952.

Hearing Denied Dec. 29, 1952.

Objections were filed through guardian ad litem to petition for distribution of estate of objector's grandfather upon ground that under the Probate Code the objector was a pretermitted heir and was entitled to succeed to the same share of estate as if objector's grandfather had died intestate. The Superior Court, Shasta County, Albert F. Ross, J., rendered a judgment adverse to the objector and the objector appealed. The District Court of Appeal, Peek, J., held that objector was not a pretermitted heir entitled to share in estate as if objector's grandfather had died intestate.

Judgment affirmed.

1. Evidence ⚿65

In construing will testator would be presumed to know the law of succession.

2. Descent and Distribution ⚿47(2)

Will paragraph reciting that testator purposely made no provision for any other person, whether claiming to be an heir of testator or not, and providing that if any person should contest will or object to its provisions, and should establish right to participate in testator's estate, such person was bequeathed $1 in lieu of any provision made or which might have been made for such person, showed that failure of will to provide for a child of a son of testator who predeceased testator was intentional and such child was therefore not a pretermitted heir entitled to share in testator's estate as if testator had died intestate. Probate Code, § 90.

◆

Glickman, Orr & Heuring, Oakland, David I. Wendel, Oakland, of counsel, for appellant.

Sampson & Dryden, Los Angeles, Chenoweth & Leininger, Redding, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from the judgment and order denying her claim as a pretermitted heir of Frank Talmage and decreeing final distribution of the estate.

The decedent had five children, four of whom survived him. The fifth, Frank Talmage, Jr., predeceased his father and left surviving him one child, Joan Talmage McGowan, the appellant herein.

Through her guardian ad litem Joan filed objections to the petition for distribution of her grandfather's estate upon the ground that under Probate Code section 90 she was a pretermitted heir and hence entitled to succeed to the same share of his estate as if he had died intestate. Said section reads as follows:

> "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

At the conclusion of the hearing upon the issue so raised the court found her to be the granddaughter of the decedent by a predeceased son; that it was not true that decedent failed or omitted to provide for her; that she was provided for in paragraph Eighth of his will; that it was true neither she nor her father was mentioned by name in decedent's will; "that it is true that Frank Talmage, deceased, provided for said Joan Talmage McGowan in paragraph 'Eighth' of said Will and therein gives and bequeaths to her the sum of $1.00"; and that it is not true that Joan Talmage McGowan is a pretermitted heir of decedent and entitled to share in his estate as if he had died intestate. The judgment which was thereafter entered awarded Joan the sum of $1.

The parties appear to be in agreement that paragraph Eighth of the will is the only portion thereof bearing on the determination of the questions so raised. That paragraph reads:

> "I have purposely made no provision for any other person, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this Will or not mentioned herein, shall contest this Will or object to any of the provisions hereof, having established in a court of competent jurisdiction a right to participate in my estate in any degree whatsoever, I hereby give and bequeath to such person or persons the sum of One Dollar, and no more, in lieu of the provision which I have made, or which I might have made, herein for such person or persons so contesting or objecting."

Appellant contends the only clause of the will which could be construed to imply an intent to omit appellant from its provisions is said paragraph Eighth, which clause cannot be construed in such a manner because it is merely a "no contest" provision found in nearly all attorney prepared wills. Appellant also argues that if paragraph Eighth be construed to show an intention to omit the claimants, Probate Code section 90 would be completely nullified. Appellant further argues that paragraph Eighth is too general in nature to indicate a specific intent to omit Joan Talmage from the provisions of the will, being merely a catch-all provision intended to take care of anything the testator may have overlooked in preparing his will. This is exactly what Probate Code section 90 guards against, the argument continues, i. e., the overlooking of a person within the pretermitted class, and the statute therefore should control and Joan Talmage be allowed to take as a pretermitted heir.

We do not think the decisions support such contention. In Re Estate of Price, 56 Cal.App.2d 335, 132 P.2d 485, 486, the case principally relied upon by appellant in support of such contentions, the trial court found two children of a deceased child of the testator to be pretermitted heirs and as such were entitled to share in the estate. The will in that case contained a clause reading:

> "I purposely refrain from leaving anything by this my last will and testament to any other person or persons, and in the event that any other person or persons shall either directly or indirectly contest this my last will and testament I give to any such person or persons contesting said will the sum of $1 and no more, hereby declaring that I have only at this date two surviving children, to wit: my said two sons above named."

The District Court of Appeal in its decision upholding the judgment, in discussing the leading case on this subject, In re Estate of Trickett, 197 Cal. 20, 239 P. 406, said:

> "In [Re] Estate of Trickett the excluding clause read in part (page 22 of 197 Cal., page 407 of 239 P.): '* * * all other property * * * is to be divided amongst the four children mentioned * * * not their heirs or any other relatives or friends of mine.' In holding that this clause was sufficient to exclude grandchildren not mentioned, the court said (pages 22, 23 of 197 Cal., page 407 of 239 P.): 'We are limited, therefore, to the terms of the will under consideration for the determination of the question of whether or not decedent intentionally omitted appellants, his heirs at law, from his will. It must appear upon the face of the will, not only that the omission was intentional, but "the words of the will must show that the testator has the persons omitted in his mind, and having them so in his mind, has omitted them from the provisions of the will." [Citing cases]' And again (page 25 of 197 Cal., page 409 of 239 P.) 'Marked and measured by the meaning of the word "relatives," as employed in testamentary dispositions, the conclusion is inescapable that the testator in the instant case must have had in mind his blood relations, among whom, necessarily, were his grandchildren, the appellants herein, and consequently must have intended to exclude them from participation in his estate. The testator was emphatic in his declaration that no "other relatives" should take under his will, and as was said in Estate of Lindsay, [176 Cal. 238, 168 P. 113] supra, "*read in the light of the law of succession* (Section 1386, Civ.Code), *the will shows on its face that the testator had in mind the very persons, or the very class of persons, here asserting a right to succeed to a portion to his estate.*"'" (Emphasis added.)

The court, after applying these rules to the case, concluded:

> "The plain terms of the code section calling for a showing upon the face of the will that 'such omission was intentional' preclude a holding that a general exclusion of all persons not mentioned is sufficient."

[1, 2] Turning to the will involved in the instant case we note the testator stated he "purposely made no provision for any other person, whether claiming to be an heir of mine or not." Under the rule of the Trickett case this was sufficient to show that the omission to provide for Joan Talmage, the issue of a deceased child of the testator, was intentional. This provision read in the light of the law of succession, which we must presume the testator to have known, In re Estate of Lindsay, 176 Cal. 238, 168 P. 113, 114, "shows on its face that the testator had in mind the [very] persons, or the very class of persons, here asserting a right to succeed to a portion of his estate." In re Estate of Price, supra. In the Price case the decision appears to have been based upon the premise that a general reference to "any other person or persons" was too broad to show that the testator had in mind the class of heirs (grandchildren) there claiming a right to succeed to the estate. But a clause stating "no provision for any other person, whether claiming to be an heir of mine or not" cannot be said to fail to show the testator had in mind a claimant coming within that class of persons. Thus Joan Talmage, being an heir of the decedent within the excluded class and the omission as shown by the face of the will to have been intentional, she is therefore precluded from sharing in the

estate except for the nominal sum of $1 as provided in paragraph Eighth.

The judgment and order are affirmed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

113 Cal.App.2d 895

In re WILLIAMS' ESTATE.

NICHOLS et al. v. WILLIAMS.

Civ. 4467.

District Court of Appeal, Fourth District, California.

Oct. 29, 1952.

Hearing Denied Dec. 22, 1952.

Petition by executors for decree of distribution. Objections were filed. The Superior Court, San Bernardino County, R. Bruce Findlay, J., overruled objections to the petition for distribution and entered an order of distribution and the objector appealed. The District Court of Appeal, Barnard, P. J., held that testator had bequeathed to a brother all his California property except for $1,000 which was bequeathed to another brother.

Affirmed.

1. Wills 🔑439, 440, 470

A will should be construed in accordance with testator's intention which must be obtained by considering entire will, by examining testamentary language and determining what was meant by words actually used.

2. Wills 🔑435

In construing will, presumptions and other rules, when necessary, must be used to supplement and aid application of primary rules of construction and not as substitutes therefor.

3. Wills 🔑465

Ordinary rules for punctuation and capitalization are important in construing will but are not controlling when it appears from natural sense of language used that a strict application of such rules would distort or change the expressed intention and prevent a reasonable construction of will, especially where entire will discloses that testator paid little or no attention to such matters.

4. Wills 🔑465

Under will bequeathing to testator's "beloved Brothers W a Williams. all my holdings in the state of Calif all dinonds and house furnishings included Whatsoever except $1000. cash to go to G. G. Williams my Brother", the first named brother received all of testator's California property except $1,000 which was bequeathed to the other brother.

Allard, Brownsberger, Shelton & O'Connor, L. A. Shelton, Pomona, for appellant.

Marlin H. Shirley, Pomona, Swing & Gillespie, San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order overruling objections to a petition for distribution, and from an order of distribution.

Leroy F. Williams died on March 14, 1950, leaving an holographic will dated January 18, 1950. This will consisted of one page and purported to dispose of all of his property in California, and in another clause of his property in New Mexico.

In due course, the executors filed a petition asking for a decree distributing $1000 to G. G. Williams, and all other property in California to W. A. Williams. G. G. Williams filed objections, contending that all of the California property, except for $1000, should be distributed to him or, as an alternative, that the California estate should be divided equally between them, except that an additional $1000 should go to him. The court adopted the interpretation placed on the will by the executors and entered a decree distributing $1000 to G. G. Williams, and the remainder of the California property to W. A. Williams. This appeal followed.

There was no conflict in the evidence. The matter was submitted upon the will itself, with a stipulation that the testator had received but a third grade education; that he was 65 years old when the will was executed; and that at that time G. G. Williams and W. A. Williams were his only living brothers.

The disputed portion of the will, and the only part which refers to the California property, reads as follows:

> "I give devise and bequeath unto my beloved Brothers W a Williams. all my holdings in the state of Calif all dinonds and house furnishings included Whatsoever except $1000. cash to go to G G Williams my Brother".

The appellant contends that the quoted provision is divided into two sentences, and that three constructions are possible: (1) that the construction adopted by the court, giving all of the property to W. A. Williams, except for $1000, can be reached only by ignoring punctuation, capitalization and sentence structure, and by ignoring or changing the word "Brothers"; (2) that upon a literal reading the only sentence in which W. A. Williams is mentioned is meaningless, and if that sentence is ignored the other sentence gives all of the property to G. G. Williams, except for $1000 in cash; (3) that a proper construction would be to interpolate the words "and G. G. Williams" after the name "W. A. Williams" and join the two sentences by omitting the period, thus giving all of the property to "my beloved Brothers W. A. Williams and G. G. Williams * * * except $1000 cash to go to G. G. Williams my Brother."

The appellant argues that the first of these constructions, which was adopted by the court, violates the fundamental rules of construction, ignores the punctuation and sentence structure, and changes the word "Brothers" from plural to singular. It is conceded that the second violates the rules that the words of a will are to be so construed as to give effect to all parts, when possible, and that a construction resulting in partial intestacy is not favored. It is then argued that the third should be applied here; that it violates no rule of interpretation; and that it merely corrects an omission by adding the name of G. G. Williams to an otherwise imperfect description, and by "joining the two sentences into a coherent phrase." It is further argued that existing rules provide that omitted words may be thus added to correct an imperfect description; that the description of a beneficiary prevails over the name, where there is a variance; that the general intent prevails over a particular intent; that devises and bequests may be found by implication; and that all presumptions favor an intent to follow the laws of succession, and to make a natural division of the property.

[1-3] The general rules for construing a will are well settled, and it is unnecessary to review or analyze the authorities here cited. The cardinal rule is that the will should be construed in accordance with the intention of the testator. This intention is to be sought for by looking to the entire will, by examining the language in question, and by determining what was meant by the words actually used. Presumptions and other rules, when necessary, must be used to supplement and aid the application of these primary rules, and not as substitutes therefor. Ordinary rules for punctuation and capitalization are important under some circumstances, but are not controlling when it appears from the natural sense of the language used that a strict application of such rules would distort or change the expressed intention, and prevent a reasonable construction of the will. This is particularly true where the entire will discloses that the testator paid little or no attention to these matters. 57 Am.Jur., Sec. 1115, p. 753. This principle has been followed in this state. In re Estate of Ottoveggio, 64 Cal.App.2d 388, 148 P.2d 878; In re Estate of Lewis, 91 Cal.App.2d 322, 204 P.2d 898; In re Estate of Olsen, 9 Cal.App.2d 374, 50 P.2d 70.

[4] Having examined the original will, we have arrived at the same conclusion as that reached by the trial court. This testator was a man of limited education, and his will discloses that he paid little attention to punctuation or capitalization. Some 40 such errors appear in this will; a period is improperly used in many places; in several places there is no period at the end of a sentence or paragraph; and in 12 places a period appears in the middle of what is obviously a sentence, where commas would ordinarily be used. Under these circumstances, the period following the first word

"Williams" cannot be taken as disclosing an intent to separate the quoted clause into two separate sentences. Obviously, the two portions of this clause or sentence were intended to go together. The testator was also so careless about capitalization. In another instance, in disposing of his New Mexico holdings, he spoke of property "i own" in a certain county.

It seems equally clear that no imperfect description appears in using the plural "Brothers". In what was obviously intended to be the same sentence the testator named both brothers, saying what each was to receive. While the language is crude, the intention clearly appears to give all property in California to W. A. Williams, except for $1000 which was to go to G. G. Williams. In our opinion, any other construction of the language in dispute would not be reasonable. To treat the words before the period as meaningless, or to interpolate the name of the other brother after the name W. A. Williams, would be to rewrite the will and ignore an intention disclosed by the words actually used.

The orders appealed from are affirmed.

GRIFFIN, J., concurs.

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114 Cal.App.2d 22

In re BARAJAS.

In re SANCHEZ.

In re SAUCEDO.

Civ. 4457–4459.

District Court of Appeal, Fourth District, California.

Oct. 31, 1952.

Proceedings in the matters of three boys sought to be declared wards of the Juvenile Court because of their alleged assaults on a girl by force likely to produce great bodily injury. From orders of the Superior Court of Riverside County, O. K. Morton, J., declaring the boys wards of the Juvenile Court and committing them to the Youth Authority, they appealed. The District Court of Appeal, Barnard, P. J., held that the Superior Court erred in committing the boys to the Youth Authority without making a direct finding that the boys' welfare required that their custody be taken from their parents and in refusing to hear evidence on such question.

Orders reversed and matters remanded to the Juvenile Court for rehearing.

Infants 🔑16.9, 16.10

In proceedings to declare three boys wards of Juvenile Court because of their alleged assaults on a girl with force likely to produce great bodily injury, Superior Court erred in ordering their commitment to Youth Authority, without making direct finding required by statute that their welfare required that their custody be taken from their parents, and in refusing to hear evidence on such question. Welfare and Institutions Code, §§ 700, subd. m, 739.

William M. Taylor, Coachella, for appellants.

William O. Mackey, County Counsel, Ray T. Sullivan, Jr., Deputy County Counsel, Riverside, for respondent.

BARNARD, Presiding Justice.

These are appeals from orders making three boys wards of the Juvenile Court, and ordering them committed to the Youth Authority. One of the boys was 13 years old and the other two were 14 years old. All three matters were heard together and the appeals are presented on one reporter's transcript and one set of briefs, with separate clerk's transcripts.

Each petition alleges as facts bringing the minor within the provisions of subdivision m of Section 700 of the Welfare and Institutions Code, that at 11:00 p. m. on June 27, 1951, in company with the other minors, he assaulted the person of a girl 15 years old by means of force likely to produce great bodily injury. At a hearing on July 13, 1951, the chief of police of Coachella, who filed the petitions, testified as to the story told to the officers by the girl, and that he had had no prior difficulty with any of the boys. When asked by the probation officer if it was his opinion that these boys could be controlled at home the court refused to let him answer, saying that this question called for a conclusion and was one for the court to decide. Briefly summarized, the boys testified that they were together and saw this girl; that two of them knew her; that one of them started to walk home with her and the others followed some half block behind; that the others came up and they all felt of her breasts; that she fell down on one knee and got up right away; and that they did not otherwise molest her.

The court continued the hearing to July 20, and ordered the girl brought in. She then testified that one of the boys asked to walk home with her, and the others followed a half block away; that the boy who was with her grabbed her by the arms and knocked her to the ground; that the other boys came up; that they all felt her breasts through the waist, and one of them put his hands between her legs; that they did not put their hands on her bare skin; that no attempt was made to disturb her clothes; that she tried to get away, and the boy holding her let her go; and that when she jumped up she ran and and yelled for her father.

At the conclusion of her testimony the probation officer suggested that the parents were there if the court cared to hear from them. The court expressed his lack of patience with boys that go in gangs and attack girls, pointed out what this sort of thing might lead to, and said that this was the type of offense that the court must stop right at the beginning. He then stated that he would find the allegations of the petitions to be true, that each boy would be declared a ward of the Juvenile Court, and that each would be committed to the Youth Authority. The probation officer then said that some of the parents wanted to make a statement, if the court would listen to what they had to say. The court replied that he did not see how any such statement could affect his finding. Orders were entered the same day making these minors wards of the Juvenile Court and committing them to the Youth Authority.

Each of the minors filed a notice of motion for a rehearing. This matter was heard on August 10, the minors not being present but being represented by attorneys, and by consent the matter was treated as an application for a change or modification of the original order. Section 745. The attorneys expressed themselves as satisfied with the part of the order making the minors wards of the Juvenile Court, but argued for a change in the order committing them to the Youth Authority. In this connection they argued that no evidence had been taken on this phase of the matter before the order was made, and asked for a further hearing with respect to that matter. It was also stated, and not denied, that the probation officer had reported that in his opinion each minor's home was suitable and the parents were furnishing proper supervision and training. The court denied the applications saying that it was not necessary to take any further testimony, and that he would not not have sent these boys to the Youth Authority if he "did not feel they would be improved."

The appellants contend that no proper notice was served; that they were not advised of their rights; that they were refused counsel; and that they were not allowed to present any defense. All but the last of these contentions are without merit and require no consideration.

The main contentions are that the court erred in taking custody from the parents without making the finding required by Section 739 of this Code, and by refusing to hear any evidence in that regard. So far as material here, that section provides that custody shall not be taken from the parents unless the court finds: "That the welfare of the person requires that his custody be taken from his parent or guardian." The only finding here, except as to residence and age, reads as follows:

> "That the allegations as contained in the petition filed on the 2nd day of July, 1951, are true and because of the conduct on the part of the said minor, he is in need of the control and supervision of the Juvenile Court and in further need of some type of twenty-

> four hour supervision and training, and is a person coming within the provisions of Subdivision M of Section 700 of the Welfare and Institutions Code."

The respondent argues that this finding necessarily implies a finding of the fact required by Section 739, and relies on In re Ortiz, 74 Cal.App.2d 810, 169 P.2d 664 and In re Etherington, 35 Cal.2d 863, 221 P.2d 942. In the Ortiz case, where there had been a robbery with a gun, there was some evidence on the welfare question and some of the oral remarks of the court referred to the welfare of the 17-year-old boy involved. The court held that a sufficient compliance with Section 739 appeared. In the Etherington case, involving a 17-year-old boy, the evidence showed violations of law over a period of five years, and that previous leniency had been useless. The oral remarks of the trial judge disclosed that in making the order he had considered the welfare of the boy, and it was held that his remarks sufficiently disclosed that the required finding had been made. In a dissenting opinion, two of the judges expressed the opinion that a written finding is required.

In the cited cases some evidence was received bearing on the welfare issue, the court gave some consideration to it in his oral remarks, and the main question seems to have been whether a written finding was required. In the cases before us, there was no evidence bearing on that issue, unless it may have been a favorable report of the probation officer, and the evidence was rather strictly limited to the facts relating to the offense charged. The court's oral remarks, before the order was made and entered, were confined to the seriousness of the offense and the necessity for stopping such things. The order itself is expressly based on the conduct of the minors on this occasion. The fact that these boys needed "some type of twenty-four hour supervision," does not necessarily exclude the possibility that such supervision could be supplied through cooperation between the probation officer and the parents. Apparently, the finding required by Section 739 was overlooked, and it is somewhat difficult to read it into the finding as made.

While we are in complete accord with the court's remarks as to the seriousness of such offenses and the necessity for preventing them if possible, we think this matter should be reconsidered upon all of the evidence available, and a direct finding made on the welfare and custody issue.

The orders are reversed and the matters remanded to the Juvenile Court for rehearing.

GRIFFIN, J., concurs.

114 Cal.App.2d 26

UNITED TRUCKMEN, Inc. v. LORENTZ et al.

Civ. 15277.

District Court of Appeal, First District, Division 1, California.

Nov. 3, 1952.

Action for specific performance of contract for sale of realty. The Superior Court for the State of California, in and for the county of Santa Clara, O. K. Morton, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Bray, J., held that description of the realty in the contract was not indefinite and, even if it was, parol evidence should have been admitted to explain what parties meant by terms used.

Judgment reversed.

1. Vendor and Purchaser 🔑22

Land description in contract for sale which referred to the southerly portion of that certain property being under name of vendor and bounded on east by South Tenth Street and the south by the Western Pacific Railroad, being about 275 feet on South Tenth Street by approximately 500 feet deep and containing three acres was not indefinite in view of facts that the parcel attempted to be described was the only one in name of vendor, that actual dimensions of tract were 500.05 feet by 275 feet, and that tract contained 3.11 acres.

2. Evidence ⚿461(3)

In action for specific performance of contract for sale of realty, even if description in contract was ambiguous, admission of parol evidence to determine what parties intended when they said "about 275 feet," "approximately 500 feet," and containing "about three acres," would have been proper since it would not constitute an attempt to vary, add to, or subtract from terms of the written agreement.

3. Vendor and Purchaser ⚿22

Less strictness in the description of property is demanded in a contract for sale of realty than in a deed of conveyance.

4. Vendor and Purchaser ⚿61

In construction of executory contracts of sale of realty, courts have been most liberal and have sought, so far as consistent with established rules, to give effect to intention of parties in applying descriptions of property.

5. Vendor and Purchaser ⚿80

The description in a contract for sale of realty may be supplemented by extrinsic evidence showing application of the description to particular property to the exclusion of all other property.

6. Evidence ⚿460(7), 461(2)

Parol evidence is ordinarily admissible to show what property parties intended to convey, and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject matter of the contract.

7. Evidence ⚿460(7)

Where description in contract for sale of realty, so far as it goes, is consistent but does not appear to be complete, it may be completed by extrinsic parol evidence provided a new description is not introduced into the body of the contract.

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Rankin, Oneal, Luckhardt, Center & Hall, J. E. Longinotti, San Jose, for appellant.

Bohnett, Hill, Cottrell & Bohnett, L. D. Bohnett, San Jose, for respondents.

BRAY, Justice.

In an action for specific performance of a contract for sale of real property, judgment went for defendants. Plaintiff appeals.

Questions Presented.

1. Was the description of the real property indefinite?

2. If so, was it so indefinite as to exclude the admission of parol evidence?

Facts.

Defendant Ernest Lorentz, Sr., agreed to sell and plaintiff to buy certain real property in Santa Clara County. The agreement was in the form of a "Deposit Receipt." The property is described as "the following described property, situate in the County of Santa Clara, California: The southerly portion of that certain property being under the name of Ernest Lorentz, Sr., and bounded on the East by South Tenth Street and on the South by the Western Pacific Railroad, being about 275 feet on South Tenth Street by approximately 500 feet deep, containing about 3 acres. * * * The total purchase price is Nine Thousand ($9,000.00) Dollars. * * *" The property belongs to both defendants as joint tenants. No point is made in the case that the agreement to sell was signed only by the husband. When the seller refused to go through with the sale, plaintiff sued both defendants for specific performance. At the trial plaintiff offered the deposit receipt in evidence, but the court sustained an objection to its admission on the ground that the description in it was uncertain and it could not be determined therefrom what land was intended to be sold.

The whole property, of which that sold was a portion, is approximately 10½ acres and is the only property of defendants or either of them in the vicinity of South Tenth Street and the Western Pacific Railroad. The property does not run directly north and south, but on an angle running northwesterly and southeasterly. It is bounded on the south by the Western Pacific Railroad. This southerly line is 500.05 feet long. It is bounded on the east by

South Tenth Street. A surveyor, called by defendants, testified that it would be impossible to identify the "about 3 acres" mentioned in the receipt. He did testify that if in determining the easterly boundary "you would say a flat three acres and 275 feet on Tenth Street," there would not be any trouble with the description. He pointed out that taking a point on South Tenth Street 275 feet northerly from the southerly boundary (the Western Pacific Railroad) and running a line geographically west from that point would result in an area southerly of that line of approximately 6.11 acres, and the northerly line of the area would be considerably longer than 500.05 feet. Running the line from that point westerly and parallel with the northerly line of the whole tract would result in an area southerly of that line of approximately 3.59 acres. The northerly line of that area would be shorter than 500.05 feet. Running the line westerly and parallel to the southerly line of the tract would result in an area southerly of that line of approximately 3.11 acres. This latter parallelogram would be 500.05 feet on its southerly boundary (the Western Pacific Railroad), 275 feet on Tenth Street, its easterly boundary, 500.05 feet on its northerly boundary, and 275 feet on its westerly boundary (the westerly boundary of the whole tract). Such a parallelogram would come very close to meeting the description given, being "*about* 275 feet on South Tenth Street by *approximately* 500 feet deep, containing *about* 3 acres."[1]

Real estate agent Cancilla had been asked by plaintiff to find a suitable lot for it. Cancilla contacted defendant Ernest Lorentz and was authorized by him to sell a portion of his property to plaintiff. Cancilla drew up the receipt agreement and it was signed by both plaintiff and defendant Ernest. The latter signed an agreement to pay Cancilla a commission on the sale. At the trial, plaintiff attempted to question both Cancilla and defendant Ernest about the circumstances surrounding the execution of the agreement as they related to the description and its meaning, but defendants' objection thereto was sustained by the court on the ground that the description was too uncertain to permit parol testimony concerning it. Plaintiff then offered to prove that the description was prepared by Cancilla as agent for defendant Ernest. An objection to this evidence was sustained.

1. Is The Description Indefinite?

[1] We are not convinced that it is. The main parcel is easily identifiable. It is the only property at South Tenth Street and the Western Pacific Railroad in the name of Ernest Lorentz, Sr. A surveyor going to that piece of property and finding that its easterly boundary is South Tenth Street, its southerly boundary is the Western Pacific Railroad, and that boundary is 500.05 feet long, would be entitled to consider that distance the "approximately 500 feet deep" mentioned in the agreement. He would be entitled to assume the northerly boundary to be the same length as the southerly boundary (the westerly and easterly boundaries of the main tract are parallel) because the area sold is "approximately 500 feet *deep*." Then he would be authorized to take 275 feet (although expressed "*about* 275 feet") as the easterly and westerly boundaries. (See Wise v. Burton, 73 Cal. 166, 14 P. 678, where the court disregarded the word "about" in the description of a distance.) This gives a tract of 3.11 acres, "about 3 acres." This is a reasonable and logical application of the description. The agreement shows on its face that the property sold does not contain *exactly* 3 acres (it says "*about* 3 acres"). The defendants contend that the purchase price was $3,000 per acre (a statement to that effect was originally in the deposit receipt but was stricken out) and that therefore the defendants could not have contemplated selling 3.11 acres for $9,000. This, however, would be a matter for the court to consider in connection with the circumstances developed concerning the meaning of the ambiguous words.

2. Parol Evidence.

[2] Assuming, however, that the agreement is ambiguous, we can see no reason why parol evidence should not be admitted (if it exists) to explain what the parties

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[1] All italics added, unless otherwise noted.

meant by the terms *"about* 275 feet," *"approximately* 500 feet *deep,"* and *"about* 3 acres." Certainly, if those terms are cleared up there would be nothing indefinite or uncertain about the description, nor would there be any adding to or varying of the description. We, of course, have no way of knowing what the parol evidence will show. If it shows that by those terms was meant a tract 500.05 feet in depth, the length of the southerly boundary (which is definitely set forth as the Western Pacific Railroad), by 275 feet in width, there would be no uncertainty in the description. On the other hand, if something else was intended which makes an indefinite or uncertain description, then the court would have to so find.

[3-6] Johnson v. Schimpf, 197 Cal. 43, 239 P. 401, sets forth the test of the sufficiency of the description in an executory contract for the sale of real estate, and the admissibility of parol evidence concerning it, together with a list of authorities on the subject. "It is now the general and well-established rule that less strictness in the description of property is demanded in a contract than in a deed of conveyance. In the construction of executory contracts of sale of real estate, courts have been most liberal, and have sought, as far as consistent with established rules, to give effect to the intention of the parties in applying descriptions of property. The usual rigid construction given to deeds has not been adhered to in the character of contracts under consideration here. The description may be supplemented by extrinsic evidence showing its application to particular property to the exclusion of all other property. Parol evidence is ordinarily admissible to show what property the parties intended to convey, and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject-matter of the contract. Preble v. Abrahams, 88 Cal. 245, 26 P. 99, 22 Am.St.Rep. 301; Marriner v. Dennison, 78 Cal. 202, 20 P. 386; Sparks v. Hess, 15 Cal. 186; Lange v. Waters, 156 Cal. 142, 103 P. 889, 19 Ann. Cas. 1207; Towle v. Carmelo L. & C. Co., 99 Cal. 397, 33 P. 1126; Carr v. Howell, 154 Cal. 372, 97 P. 885; [In re] Estate of Garnier, 147 Cal. 457, 82 P. 68; California Pac[king] Corp. v. Grove, 51 Cal.App. 253, 196 P. 891." 197 Cal. at page 48, 239 P. at page 403. See also Wright v. L. W. Wilson Co., Inc., 212 Cal. 569, 299 P. 521, and Ralston v. Demirjian, 86 Cal.App.2d 124, 194 P.2d 41. In the Wright case [212 Cal. 569, 299 P. 522] the property is described in the contract to exchange real property merely as "L. Street lots, Fulton Street lots, M. Street lots * * *." After referring to the rule in the Johnson case, above quoted, the court quoted from Marriner v. Dennison, 78 Cal. 202, 20 P. 386, as quoted in Russell v. Ramm, 200 Cal. 348, 254 P. 532: "' * * * The rule is that, where the description, so far as it goes, is consistent but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract * * *'"; held the description sufficient, and that the trial court properly admitted parol evidence to identify the property. In the Ralston case the action was for a real estate commission for the sale of property described as a 20 acre vineyard located on the southwest corner of Dinuba Avenue and Highway 99 in Fresno County. "'The seller will take out only two acres from the corner for the gas station and other business. The boundary line of the 20 acres shall start 50 feet from the farthest Bldg. on the 99 Highway side.' * * * The contract also contained a marginal recital as follows: 'The total acreage being 22 ac. the seller will retain only 2 ac. on the corner, leaving 20 ac. for the buyer.'" 86 Cal.App.2d at page 125, 194 P.2d at page 42. Defendants, sellers, had refused to go through with the sale because of the uncertainty in the description of the 2 acres reserved. A survey showed that the entire ranch contained only 19¾ acres and "that the boundary did not start at Dinuba Avenue and Highway 99 but commenced at the center line of the Fowler Switch Canal where it intersects the State Highway, and that 1¾ acres of the property was located across Dinuba Avenue." Quoting the above statement from the Johnson case, the court held the description sufficient. A

similar case is Russell v. Ramm, supra, 200 Cal. 348, 254 P. 532, where the only description was "Name: Charles Ramm 60 acres $120,000 Located one mile from Dinuba' ", 200 Cal. at page 354, 254 P. at page 535. Parol evidence was admitted to show the land intended. The court quoted the statement above set forth from Marriner v. Dennison, 78 Cal. 202, 20 P. 386. It also referred to the descriptions considered in other California cases and stated, 200 Cal. at page 369, 254 P. at page 539: "These descriptions were held to be sufficient in written instruments involving transactions of the character of the one here *or in executory contracts relating to the transfer of real property,* and in none of them was the description of the real property more definite than that of the real property in the listing card in this case."

[7] Defendants rely on Marriner v. Dennison, supra, 78 Cal. 202, 20 P. 386. Interestingly enough, it supports their position only in the fact that it held the description in the exchange agreement insufficient only because the plaintiff there had failed to set forth in his complaint the true description. The property to be exchanged for certain Massachusetts property was described in the agreement as certain numbered lots in defendant's subdivision of the Magee tract. The city, county, state or country where this tract was situated was not mentioned. The court endorsed the rule which we are applying here, namely, "The rule is that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract * * *." 78 Cal. at page 207, 20 P. at page 389. But because a part of the rule is, "and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete", 78 Cal. at page 207, 20 P. at page 389, and the complaint did not contain such averments, the court denied recovery. (Incidentally, the complaint in our case contains the necessary averments.) Smith v. California Portland Cement Co., 134 Cal.App. 630, at page 632, 25 P.2d 1013, at page 1013, cited by defendants, merely holds that where a surveyor testified that it was not possible from the description in the deed to locate on the ground the land imperfectly described therein, and "No evidence to the contrary was offered", "nor did the appellants offer any proof which would have made the deed, if admitted, of any value to them", the trial court was justified in refusing to admit the deed in evidence. In Scott v. Woodworth, 34 Cal.App. 400, 167 P. 543, the description was completely vague and uncertain and in nowise comparable with the description in our case. Our description, at its worst, comes within the following statement in that case, 34 Cal. App. at page 409, 167 P. at page 546: "It is true that the description by boundaries may be ambiguous or indefinite, and still the deed sufficient if it otherwise provides means whereby the description can be made certain and the land identified and located."

In Gordon v. Perkins, 108 Cal.App. 336, 291 P. 644, also cited by defendants, the description was "N.E. ¼ of N.E. ¼ of Section 35, 11/17 * * *." No designation of the township or range, county or state was mentioned. The court held that in view of the statute of frauds this description did not furnish a sufficient foundation for the admission of extrinsic evidence. However, it stated, 108 Cal.App. at page 340, 291 P. at page 645: " '* * * it is sufficient, as regards subject matter, where it furnishes a sufficient foundation for the admission of extrinsic evidence to apply the description and by means of such evidence the particular tract of land which is the subject matter of the agreement may be identified and located to the exclusion of all others.' " The description in our case comes within the latter rule.

Defendants cite Thompson v. McKenna, 22 Cal.App. 129, 133 P. 512, for the proposition that this court is bound by the court's finding in our case that the description is so indefinite as not to permit parol evidence concerning it. The Thompson case does not so hold. In fact it supports plaintiff's contentions here. The deed description being considered stated that the land was in Ventura County and was the "west half of the southwest quarter of section 12, No. 31, containing 70 acres, more or less." The court said, 22 Cal.App. at pages 131–132, 133 P. at page 513: "This description standing alone is *prima facie* insufficient as a means of identifying the land intended to be conveyed. Notwithstanding this fact, plaintiff was entitled to show by extrinsic evidence that it was in fact sufficient as a means of such identification. 'Any description by which the property may be identified by a competent surveyor, with reasonable certainty, either with or without the aid of extrinsic evidence, will be sufficient.' Law v. People, 80 Ill. 268; Best v. Wohlford, 144 Cal. 733, 78 P. 293. Parol evidence is admissible, not for the purpose of adding to or varying the description contained in the deed, but for applying the description to that part of the surface of the earth which is the subject-matter of the deed." It was concerning this evidence that the court then stated, 22 Cal.App. at page 132 133 P. at page 513: "Whether or not such evidence is sufficient to show that the land can be identified with reasonable certainty is a question of fact for the trial court." Had the court here admitted parol evidence to explain the ambiguous terms in the description, and had there been a conflict in the evidence or the reasonable inferences therefrom, this court would, of course, be bound by the court's findings. Here, on the evidence of the surveyor, there was no conflict. He testified, in effect, that by taking 275 feet on South Tenth Street, instead of "*about* 275 feet," by the depth of 500.05 feet, the known length of the southerly line, referred to as "about 500 feet," there would have been no difficulty in locating the tract. The court refused to permit evidence that such was the intent of the parties. In Saterstrom v. Glick Bros. Sash etc. Co., 118 Cal.App. 379, 5 P.2d 21, the court held fatally defective a description in a deed of trust which failed to state the county in which the property was located. As pointed out in the authorities cited above, less strictness is required in a description in a contract than in a deed. Moreover, there is nothing in the opinion in that case which indicates that any offer of parol evidence was made. Therefore, there was nothing before the court by which it could determine what county was intended.

In our case, to determine by parol evidence what was intended by the parties when they said "about 275 feet," "approximately 500 feet deep" and containing "about 3 acres," is in no manner attempting to vary, to add to, or subtract from the terms of the written agreement, "but it should be, and is admissible, to explain what the parties meant by what they said." Wells v. Wells, 74 Cal.App.2d 449, 457, 169 P.2d 23, 27. "It is to be remembered that 'that is certain which can be made certain.'" 23 Cal.Jur. 436.

In Preble v. Abrahams, 88 Cal. 245, 26 P. 99, the agreement was to sell "forty acres of the eighty-acre tract at Biggs." The court held that "Parol evidence is always admissible to explain the surrounding circumstances and situations and relation of the parties, at and immediately before the execution of the contract, in order to connect the description with the thing intended, and thereby to identify the subject-matter, and to explain all technical terms and phrases used in a local or special sense", 88 Cal. at page 250, 26 P. at page 99, and held proper the admission by the trial court of parol evidence to show the particular 40 acres intended by the parties. See also Towle v. Carmelo L. & C. Co., 99 Cal. 397, 33 P. 1126.

There are cases in which the descriptions of the lands sold were so indefinite and uncertain that the courts held the statute of frauds applied to the contract and that parol evidence was not admissible because, in effect, such evidence would vary, contradict or add to the terms of the written agreement. In Craig v. Zelian, 137 Cal. 105, 69 P. 853, the description was "a strip of land in front of Golden Rule Store and Stent Market." As said by the court in upholding the refusal of the trial court to permit parol evidence of what was meant, 137 Cal. at page 106, 69 P. at page 853, "The land was not inclosed or in any mode designated upon the ground. How far it is located from the Golden Rule Store, or the width of the 'strip,' or its length, is not given, and it must be held that there is no description of the land intended to be conveyed." It is obvious that this description is so vague that to make it definite and certain would require practically a complete new description. This case and others of similar holding are distinguishable from ours in that very fact. Ellis v. Klaff, 96 Cal.App.2d 471, 476, 216 P.2d 15, contains a well supported discussion of the requirements of both the parol evidence rule and the statute of frauds. "The evidentiary consequences of the Statute of Frauds, Civ.Code, sec. 1624, are in many respects similar to those of the parol evidence rule, Code Civ.Proc., sec. 1856. Both require exclusion of extrinsic evidence which would vary, contradict, or add to the terms of the written agreement under consideration, Craig v. Zelian, 137 Cal. 105, 69 P. 853, statute of frauds; * * *." 96 Cal.App.2d at pages 475–476, 216 P.2d at page 19. The Craig case and other similar cases come within this rule. "* * * both permit reception of such evidence to identify the subject matter of the contract from the written description, explain the meaning of ambiguous, abstruse, or technical expressions, and assist in interpreting the expressed intentions of the parties in the light of circumstances existing at the time of execution." Ellis v. Klaff, supra, 96 Cal.App. 2d at page 476, 216 P.2d at page 19. Our case comes within this rule. The court should have received evidence of the surrounding circumstances of the execution of the agreement which might lead to an understanding of the terms used and to an identification of the property.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

* * *

114 Cal.App.2d 11

PEOPLE v. MICKALIAN.

Cr. 4878.

District Court of Appeal, Second District,
Division 2, California.

Oct. 31, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., of selling marijuana cigarettes, and his motion for new trial was denied, and he appealed. The District Court of Appeal, Fox, J., held that mere asking of question of officer to whom marijuana had been sold, concerning murder of third person, was not misconduct warranting new trial, when jury had been instructed to disregard same, and when question was not part of persistent course of conduct.

Affirmed.

1. Criminal Law 🔑730(3)

In prosecution of defendant for sale of marijuana cigarettes, wherein defendant had testified that officer to whom marijuana had been sold had frequently requested him to procure same, and that such request was the only subject defendant had ever discussed with the officer, question on surrebuttal which inquired of defendant whether in fact most of his conversation with such officer had to do with murder of third person killed prior to giving testimony in criminal case in federal court, was not such misconduct as to warrant new trial, when court had instructed jury to disregard question and when question was not a part of any persistent course of conduct. Health and Safety Code, § 11500.

2. Criminal Law 🔑1154

Whether alleged misconduct of prosecuting attorney has prevented defendant from having fair and impartial trial depends largely upon the facts of each case, and decision of trial court that defendant has had a fair and adequate trial is determinative on appeal in absence of a clear abuse of discretion.

3. Criminal Law 🔑1160

In prosecution for sale by defendant of marijuana cigarettes, wherein testimony of officer to whom cigarettes had been sold was attacked on ground of bias and prejudice rendering it unworthy of belief, question of credibility of such officer and weight to be given his testimony was initially for jury, and later for trial judge in passing on motion for new trial, and their determination was binding on appellate court. Health and Safety Code, § 11500.

4. Poisons ⚷9

Evidence sustained conviction of defendant for selling marijuana cigarettes. Health and Safety Code, § 11500.

J. Thomas Russell, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted by a jury of having sold to Deputy Sheriff Grimes 15 marijuana cigarettes in violation of section 11500 of the Health and Safety Code. He appeals from the ensuing judgment and the order denying his motion for a new trial.

[1] Defendant bases his appeal upon the alleged misconduct of the prosecuting attorney. The particular incident occurred during the cross-examination of defendant on surrebuttal. Defendant had testified that Grimes had frequently importuned him over a period of time to get some marijuana for him. Defendant further testified that was the only subject the officer ever discussed with him. The deputy district attorney then propounded this question: "Now, isn't it a fact that most of your conversations with this officer had to do with the murder of Davidian?" Defense counsel objected to the question on the ground that it was irrelevant and immaterial and improper cross-examination, cited it as misconduct on the part of the prosecutor, and asked the court to instruct the jury to disregard the question. The court sustained the objection and admonished the jury to disregard the question and "to treat it as though you had not heard it."

It appears from defendant's brief that shortly before this conversation between the officer and defendant a person by the name of Davidian, who was expected to be a witness in a criminal case in the Federal court, was killed in Fresno and that considerable publicity followed in the Los Angeles press. It is said that the jurors could easily deduce that Davidian and defendant were both of the same race, namely, Armenians, and that the question was asked to appeal to the passion and prejudice of the jury. The prosecutor justified the question on the theory of impeachment; viz., that the officer and defendant had discussed matters other than the procurement of marijuana, which defendant had testified was the only thing the officer ever discussed with him. There is nothing to suggest that the question was not asked in good faith. While the objection was properly sustained, it is difficult to see how the question could have had the prejudicial effect defendant claims. There is nothing in the question in any way implicating defendant in the commission of that crime or even remotely connecting him with it. No mention was made by the prosecutor that either the defendant or Davidian were Armenians. There was no suggestion that the two had ever had any business or social contact or even knew one another. It was simply an inquiry as to a subject matter of their conversation.

[2] There is no fixed rule by which alleged misconduct can be measured for the purpose of determining whether it prevented a defendant from having that fair and impartial trial which the law demands for every person charged with a crime. It depends largely upon the facts of each case. People v. Braun, 14 Cal.2d 1, 7, 92 P.2d 402; People v. Kirkes, 39 Cal.2d 719, 249 P.2d 1. Here we have a single question—not a persistent course of conduct; the objection to the question was promptly sustained; and the jury was properly instructed to disregard the question, which instruction it is presumed to have heeded. People v. Kristy, 111 Cal.App.2d 695, 245 P.2d 547. The trial court had an opportunity to consider the likely effect of this question upon the jury and the likelihood of prejudice resulting to the defendant when ruling on the motion for a new trial. In denying that motion the trial court commented, "I think the defendant in this case had a fair and adequate trial." This decision is determinative on appeal in the absence of a clear abuse of discretion. People v. Kross, 112 Cal.App.2d 602, 247 P.2d 44. We find no such abuse.

[3] Defendant attempts to accentuate the importance of his charge of misconduct by attacking Officer Grimes in an effort to show he was biased and prejudiced against defendant and that his testimony was unworthy of belief. It was initially for the jury and later for the trial judge, in passing on the motion for a new trial, to determine the credibility of the witnesses and the weight that should be given their testimony. They obviously believed Grimes' story of his purchase of the marijuana cigarettes from defendant. Their finding on that question is binding on appeal.

In an attempt to discredit the People's case, mention is made that defendant was not arrested when the purchase was made and while he had the marked money in his possession. He was not actually arrested for some days after the sale. The explanation offered for this delay in making the arrest was that the officers were hoping in the meantime to locate the source of defendant's narcotic supply. The jury could well accept such explanation as entirely reasonable and true.

[4] Defendant argues, in effect, that the evidence respecting his guilt is close, and therefore the alleged misconduct of the district attorney takes on added significance. His premise is not well founded. There was direct testimony of the sale of the marijuana cigarettes by the defendant to Officer Grimes. Deputy Sheriff Vega viewed part of the transaction from a distance. He testified he saw Officer Grimes hand something to the defendant after which Grimes followed defendant into the building where the cigarettes were located. Officers Grimes and Vega, along with their superior, Sergeant Heinz, met at a previously arranged place immediately after the transaction, at which time Grimes handed over the marijuana cigarettes he had purchased from the defendant. After he was taken into custody Deputy Sheriff Vega testified defendant admitted, on two separate occasions, that he had sold the marijuana cigarettes to Grimes. Two other deputies, McKinney and May, testified that when they accompanied Grimes during the preliminary investigation of defendant they had overheard conversations in which defendant indicated his willingness to get marijuana for Grimes. Although the defendant denied the testimony of the officers, it cannot be said that the evidence in this case is so closely balanced and the guilt of the defendant not so clearly established that the asking of the single objectionable question likely turned the scales against him.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

SERVE YOURSELF GASOLINE STATIONS ASS'N, Inc. et al. v. BROCK et al.

L. A. 21968.

Supreme Court of California, in Bank.

Oct. 31, 1952.

Rehearing Denied Nov. 25, 1952.

Action by owners and operators of self service gasoline stations against Director of the Department of Agriculture for judgment declaring that provisions of Business and Professions Code regulating price advertising on or near gasoline stations were unconstitutional and inapplicable to plaintiffs' price signs. The Superior Court, Los Angeles County, Julius V. Patrosso, J., rendered judgment for defendant, and plaintiffs appealed. The Supreme Court, Spence, J., held that although the right to advertise is a property right, the requirement of full disclosure of price and brand name was a reasonable method of regulating gasoline advertising, and statutes requiring that gasoline price signs set forth in detail and in lettering as large as other lettering thereon the total price of the gasoline including tax and grade have a reasonable and substantial relation to the legitimate objective of the police power.

Judgment affirmed.

Prior opinion, 241 P.2d 593.

1. Constitutional Law 🔑48, 81

In testing propriety of legislation as an exercise of the police power, the court is limited to determining whether the subject of the legislation is within the state's power, and, if so, whether means adopted to accomplish the result are reasonably designed for that purpose and have a real and substantial relation to the objects sought to be attained, and it must be presumed at the outset that the Legislature acted within its power.

2. Constitutional Law 🔑48

The burden is upon those attacking a statute to make a showing that the statute is unconstitutional.

3. Trade-Marks and Trade-Names and Unfair Competition 🔑68(2.13)

Primary purpose of legislation regulating gasoline service stations price signs was the prevention of misleading advertising. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

4. Trade-Marks and Trade-Names and Unfair Competition 🔑68(2.1)

The prevention of misleading advertising is a purpose which is a proper subject for the exercise of the police power.

5. Constitutional Law 🔑81

Although the Legislature may be denied the power to destroy a given right, it has the authority to regulate its exercise.

6. Trade-Marks and Trade-Names and Unfair Competition 🔑68(2.13)

Legislation regulating gasoline service station price signs did not deal with price-fixing and did not affect the ultimate right to advertise price. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

7. Trade-Marks and Trade-Names and Unfair Competition 🔑68(2.2)

Although right to advertise is a property right, the requirement of full disclosure of price and brand name is a reasonable method of regulating gasoline advertising, and statutes requiring that gasoline price signs set forth in detail and in lettering large as other lettering thereon, the total price of the gasoline, including tax and grade, have a real and substantial relation to the legitimate objectives of the police power. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

8. Constitutional Law 🔑296(1)

Trade-Marks and Trade-Names and Unfair Competition 🔑68(2.2)

Statute requiring that gasoline price signs set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade, did not become oppressive or confiscatory by reason of fact that it might be more costly to conform to its requirements. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

9. Constitutional Law 🔑70(3)

In considering whether statute requiring that gasoline price signs set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade, was constitutional, Supreme Court could not consider contention that the statute represented an arbitrary attempt to eliminate competition in the retail selling of gasoline. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

10. Constitutional Law 🔑70(3)

It is not the function of the Supreme Court to search for motive in testing the constitutionality of a statute.

11. Trade-Marks and Trade-Names and Unfair Competition 🔑68(2.2)

The Legislature being, in the first instance, the judge of what is necessary for public welfare, a statute regulating gasoline price signs could not be considered invalid in absence of showing of arbitrary interference with property rights or of the lack of a substantial relation between the means and a legitimate subject for regulation. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

12. Statutes 🔑76(1)

The question whether a general law can be made applicable is one for the Legislature, to be determined in the light of the evil intended to be avoided. Const. art. 4, § 25, subd. 33.

13. Constitutional Law 🔑45

The determination of the Legislature as to whether a general law can be made applicable cannot be interfered with by the Supreme Court unless the disregard of the constitutional requirement is clear and palpable. Const. art. 4, § 25, subd. 33.

14. Statutes 🔑76(1)

Provision of Business and Professions Code prohibiting false and misleading advertising in general could not be applied to require a full disclosure of price or brand name of gasoline offered for sale, and, hence, statute regulating gasoline price signs was not a special law violative of constitution as unnecessary because a general law could be applicable. Business and Professions Code, §§ 17500, 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

15. Statutes 🔑77(1)

The constitutional prohibition against special legislation does not preclude legislative classification, but only requires that the classification be reasonable. Const. art. 4, § 25, subd. 33.

16. Statutes 🔑77(1)

The application of legislation regulating advertising signs to all persons engaged in the business of selling gasoline constituted a reasonable classification within the constitutional limitation upon special legislation. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

17. Constitutional Law 🔑48

In considering the validity as special legislation of statutes regulating use of advertising signs by persons engaged in business of selling gasoline, it would be presumed that the Legislature had made a careful investigation in the field and that it had properly determined that the interests of the public required such regulation. Business and Professions Code, §§ 20880, 20882, 20883–20886; Const. art. 4, § 25, subd. 33.

Guthrie, Darling & Shattuck, Milo V. Olson, Edward S. Shattuck and Salisbury & Knudson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and John F. Hassler, Jr., Deputy Atty. Gen., for respondents.

SPENCE, Justice.

Plaintiffs and intervenors, owners and operators of self service gasoline stations, appeal from a judgment declaring that sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code, regulating price advertising on or near gasoline stations, are constitutional and are applicable to plaintiffs' price signs.

Appellants contend that the sections in question involve an improper exercise of the police power, depriving them of their property without due process of law. It is further contended that these sections violate Article IV, Section 25, subdivision 33 of the California Constitution in that they constitute a special law that is unnecessary because a general law, Bus. & Prof. Code § 17500, is and can be made applicable. We have concluded that this regulation of price advertising is a proper exercise of the police power and that the judgment must be affirmed.

The sections in question[1] require price signs, other than price signs on the gasoline dispensing apparatus, Bus. & Prof. Code §§ 20820–20826, to set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade. Signs using the words "save," "off," "discount," "less," "below," or words of similar meaning are considered price signs. The signs employed by appellants and others in the business of owning or operating gasoline stations use thereon the words "Save," "Serve Yourself and Save," and "Save 5," followed by small lettered words "cents," "ways," "minutes," or minor variations of the same. Many of said signs do not refer to the name nor state the price of the gasoline offered for sale.

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[1] § 20880. "(a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words 'gasoline' or 'motor fuel' and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

"(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium reading, in substance, 'save' a designated amount, or a designated amount per gallon, such as 'save 5 cents' or 'save 5 cents per gallon,' or using the expression 'off' a designated amount, such as '5 cents off' or '5 cents less,' or 'discount' of a given amount, such as '5 cents discount,' or otherwise using the words 'save,' 'off,' 'discount,' 'less,' 'below,' or any of them, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

"The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

"(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter."

§ 20882. "All letters, figures or numerals used in designating the brand name or words 'no brand' in any advertising medium referred to in this article, shall be of uniform size and at least six inches in height and the height shall not be more than twice the dimension of the width of each such letter, figure or numeral."

§ 20883. "All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words 'no brand.'"

§ 20884. "The advertising medium referred to in this article shall not contain any other advertising matter whatsoever, except words of description of the product sold or offered for sale, and if words of description of the product offered for sale or advertised for sale by any such sign are used, the letters, figures or numerals which form any words, marks, letters, figures or numerals of description shall not be larger than the words, marks, letters, figures or numerals used in forming or designating the brand name or the words 'no brand.'"

§ 20885. "For the purpose of this article, fractions are considered one numeral."

§ 20886. "The numeral one or the letter 'l' need not conform to specifications prescribed for other letters, words, figures or numerals by this article but all letters, words, figures or numerals shall be the same type and design and shall be uniform with other letters, words, figures or numerals with which they are used."

[1, 2] In reviewing legislation for the purpose of testing its propriety as an exercise of the police power, "[t]he power of the court is limited to determining whether the subject of the legislation is within the state's power, and, if so, to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained." Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 456, 55 P.2d 177, 181. Furthermore, it must be presumed at the outset that the Legislature acted within its powers. Hart v. City of Beverly Hills, 11 Cal.2d 343, 348, 79 P.2d 1080. The burden is upon those attacking the statute to make a showing that the statute is unconstitutional.

[3, 4] With this brief statement of the governing principles, we turn to the legislation at hand. It is apparent upon its face that the primary purpose of this legislation is the prevention of misleading advertising, which purpose has long been deemed a proper subject for the exercise of the police power. Note, Ann.Cas.1916 A, 900; 89 A.L.R. 1004; 2 Cal.Jur.2d 606; and 11 Am.Jur., Constitutional Law, § 283, p. 1043. See also Hart v. City of Beverly Hills, supra, 11 Cal.2d 343, 350, 79 P.2d 1080; In re Sidebotham, 12 Cal.2d 434, 436, 85 P.2d 453; and In re McNeal, 32 Cal.App.2d 391, 394, 89 P.2d 1096.

[5, 6] The next step is the consideration of the means employed by the Legislature to reach this legitimate end. These involve primarily the requirement of full disclosure, a method approved in In re Sidebotham, supra, 12 Cal.2d 434, 436, 85 P.2d 453. To demonstrate the unconstitutionality of these statutes, appellants cite and rely upon a series of cases declaring statutes unconstitutional which prohibit all price advertising on or near gasoline stations except those signs of a limited size permitted on the pumps. Regal Oil Co. v. State, 123 N.J.L. 456, 10 A.2d 495; State v. Miller, 126 Conn. 373, 12 A.2d 192; and Levy v. City of Pontiac, 331 Mich. 100, 49 N.W.2d 80. But cf., Merit Oil Co. v. Director of Division of Necessaries of Life, 319 Mass. 301, 65 N.E.2d 529; People v. Arlen Service Stations, 284 N.Y. 340, 31 N.E.2d 184; and State v. Hobson, Del., 83 A.2d 846. However, the legislation under consideration here differs substantially from that involved in the above cases. There the right to maintain signs of a sufficient size to be read by a passing motorist was prohibited. Our statutes do not prohibit effective advertising in this sense. Rather, sections 20882 and 20883 of the Business and Professions Code encourage the same by establishing minimum requirements as to size of lettering on the signs, thereby making more certain that the passing motorist can read them. The difference is of significance. The ultimate right to advertise price is unaffected by our statutes. Although the Legislature may be denied the power to destroy a given right, the authority to regulate its exercise is recognized. See Hart v. City of Beverly Hills, supra, 11 Cal.2d 343, 350, 79 P.2d 1080, and cases cited therein.

The decision of the United States Supreme Court in Williams v. Standard Oil Co., 278 U.S. 235, 49 S.Ct. 115, 116, 73 L.Ed. 287, is not a barrier to this legislation. There it was held that a state could not fix the price of gasoline for the reason that the business of selling gasoline is not one "affected with a public interest." But regardless of the standard by which the validity of price-fixing legislation should be tested, Tyson & Brother United Theatre Ticket Offices v. Banton, 273 U.S. 418, 430, 47 S.Ct. 426, 71 L.Ed. 718; See Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; and Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305, the statutes in question do not deal with price-fixing and the Williams case is not controlling here.

[7, 8] Although the right to advertise is a property right, People v. St. John, 108 Cal.App.Supp. 779, 288 P. 53, the requirement of full disclosure of price and brand name is a reasonable method of regulating

gasoline advertising, and the statutes have a real and substantial relation to legitimate objectives of the police power. The law does not become oppressive or confiscatory by reason of the fact that it may be more costly to conform to its requirements.

[9, 10] Nor is there any merit in the contention that this legislation represents an arbitrary attempt to eliminate competition in the retail selling of gasoline. It is not our function to search for motive in testing the constitutionality of a statute. Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224, 69 S.Ct. 550, 93 L.Ed. 632.

[11] There can be no doubt that many gasoline price signs are misleading. When a motorist on the highway sees a sign which states in large letters "Save 5" or "5 Off," he can reasonably assume that he will save 5 cents per gallon below the price of gasoline sold in conventional service stations. And when these words are followed by the words "minutes," "ways," or the like, in small letters, the signs are highly misleading. Appellants do not argue at great length that the regulation of such signs is a violation of due process. Rather, they argue that the statute would be unconstitutionally applied if enforced against the sign "Serve Yourself and Save." Brock v. Superior Court, 12 Cal.2d 605, 610, 86 P.2d 805. Respondents have indicated an intent to so enforce the statute. While it is generally true that the motorist can realize a saving in the self service type station, and that this sign is therefore literally true, we cannot agree that the application of the requirement of full disclosure of price and brand name will violate due process of law. The convenience to the motoring public in having the price per gallon plainly disclosed where there is a representation that a saving can be made may well have been a real consideration of the Legislature in enacting the statutes. The Legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interference with property rights or of the lack of a substantial relation between means and a legitimate subject for regulation, we can not declare this legislation invalid.

The final contention that this statute violates Article IV, Section 25, subdivision 33 of the California Constitution is likewise without merit. This section states: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: In all other cases where a general law can be made applicable."

[12, 13] The question whether a general law can be made applicable is one for the Legislature, "to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere unless the disregard of the constitutional requirement is clear and palpable." People v. Mullender, 132 Cal. 217, 221, 64 P. 299, 301; Accord: Wheeler v. Herbert, 152 Cal. 224, 232, 92 P. 353; Matter of Petition of Burke, 160 Cal. 300, 302–303, 116 P. 755; and Ventura County Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 276–277, 295 P. 6. There is no disregard of the constitutional requirement here. To the contrary, it is apparent that section 17500 of the Business and Professions Code, which prohibits false or misleading advertising in general, could not be applied to require a full disclosure of price or brand name of gasoline offered for sale.

[14–17] The distinction between a general and a special law within the meaning of the Constitution has been stated as follows: "[A law] is general * * * when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction * * * [It is a special law] if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." City of Pasadena v. Stimson, 91 Cal. 238, 251–252, 27 P. 604, 607. It is therefore clear that the constitutional prohibition against special legislation does not preclude legislative classification, but only requires that the classification be reasonable. See People v. Western Fruit Growers, 22 Cal.2d 494, 506, 140 P.2d 13, and cases cited therein. Here, the legislation applies equally to all persons engaged in the business of selling gasoline. The classification is a reasonable one. Gasoline is a unique commodity in that few people, if any, can distinguish between grades or brands by the use of the senses. Unlike many other commodities, its sale is final in the sense that there is no practical way for the motorist to return or exchange the purchased commodity, if dissatisfied. Price and brand name are the principal factors in its sale, and therefore, advertising of these elements in a misleading manner is peculiarly subject to abuse. Furthermore, it must be presumed that the Legislature has made a careful investigation in the field, and that it has properly determined that the interests of the public require this regulation. Pacific Coast Dairy v. Police Court, 214 Cal. 668, 674, 8 P.2d 140, 80 A.L.R. 1217. No showing to the contrary has been made.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., and McCOMB, J. pro tem., concur.

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114 Cal.App.2d 73

DOTY v. LACEY et al.

Civ. 19022.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1952.

Action by employee of owner of oil field equipment which trucking company had contracted to load and move for injuries sustained when boom of crane furnished by independent contractor at trucking company's request collapsed while lifting a heavy piece of equipment. The Superior Court of Los Angeles County, Henry W. Willis, J., entered judgment on a directed verdict in favor of trucking company and independent contractor, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that the evidence required submission of case to jury on questions of whether operator of crane remained in general employment of independent contractor so that contractor would be liable for negligent operation of crane and whether trucking company's foreman on the job was also guilty of negligence which constituted a proximate cause of injury.

Judgment reversed.

1. Master and Servant 🔑316(1)

Owner of mobile crane, which with operator and driver was hired by trucking company to load oil field equipment which trucking company had agreed with owner of equipment to load and move, was an "independent contractor" liable for negligent operation of crane, unless crane operator became a special employee of owner of equipment. Labor Code, § 3353.

See publication Words and Phrases, for other judicial constructions and definitions of "Independent Contractor".

2. Master and Servant 🔑330(1)

Where an employer lends the services of an employee to a hirer for operation of an instrumentality owned by employer to perform such work as hirer directs without, however, relinquishing to hirer the power to discharge such employee, the legal inference is that such employee as operator of the instrumentality remains, in absence of agreement to the contrary, the employee of owner of instrumentality alone in so far as the manner and method of operating the instrumentality is concerned, and owner and not hirer of the instrumentality is liable for negligence of such employee.

3. Master and Servant 🔑330(1)

An inference exists, in absence of evidence to the contrary, that an employee remains in his general employment so long as by the services rendered another he is performing the business entrusted to him by general employer, and fact that general employer has permitted a division of control does not raise an inference that he has surrendered such control.

4. Master and Servant ⚷301(4)

A general employer may lend his employee together with an instrumentality in such a manner as to render the person to whom the employee is loaned the special employer for the time being and thereby relieve general employer from liability for employee's negligence in operation of the instrumentality, but to escape such liability, general employer must relinquish full control of employee for the time being.

5. Master and Servant ⚷301(4)

Where general employer lends his employee to a hirer for operation of an instrumentality owned by employer, together with the use of the instrumentality, fact that employee is partially under control of hirer, heeds hirer's suggestions as to details, or necessarily cooperates with hirer where work furnished is part of a larger operation is not sufficient to make him a special employee of hirer and relieve general employer from liability for negligent operation of the instrumentality.

6. Master and Servant ⚷301(4)

That general employer may at any time substitute another employee for the one loaned to hirer of an instrumentality for operation thereof, that the time of such employment is short, and that loaned servant has the skill of a specialist indicate a continuation of the general employment.

7. Master and Servant ⚷332(3)

Whether operator of crane, furnished by independent contractor at request of trucking company to load oil field equipment which trucking company had agreed with owner of equipment to load and move, became a special employee of owner of equipment or remained in general employment of independent contractor so that contractor would be liable for injuries sustained by an employee of owner of equipment as a result of negligent operation of crane was a question for jury, in absence of evidence of release by independent contractor of authoritative control over either crane or operator thereof.

8. Master and Servant ⚷316(1)

Where mobile crane and operator thereof were furnished by independent contractor at request of trucking company to load oil field equipment which trucking company had agreed with owner of equipment to load and move, any right of owner of equipment to tell crane operator what to load, when and where to go and the route to be taken in moving crane did not give owner of equipment any right of control of crane operator as to the manner and method of operating crane and did not relieve independent contractor from liability for negligent operation of crane.

9. Master and Servant ⚷318(1)

Where mobile crane with operator and driver were furnished by independent contractor at request of trucking company which had contracted with owner of oil field equipment to load and move equipment, the giving of signals by owner of equipment to crane operator constituted the giving of information and not orders and obedience of signals showed cooperation rather than subordination and was not sufficient to show a change of employer which would relieve independent contractor from liability for negligent operation of crane.

10. Master and Servant ⚷332(3)

In action by employee of oil field equipment, which trucking company had contracted to load and move, for injuries sustained when boom of crane furnished by independent contractor collapsed while lifting a heavy piece of equipment, evidence required submission of case to jury on question of whether trucking company foreman on the job was negligent in directing crane operator to proceed after boom of crane had been damaged before all employees of owner of equipment had been removed from vicinity, as requested by crane operator, and on question of whether such negligence was proximate cause of injury.

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Burum, Young & Wooldridge, Bakersfield, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for respondent Wonderly Const. Co.

Crider, Runkle & Tilson and Elber H. Tilson, Los Angeles, for respondent John A. Lacey.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants entered on a directed verdict in an action for damages for personal injuries.

Viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to plaintiff, the facts are these.

Brown Drilling Company was the owner of oil field equipment which it wanted moved from Los Angeles County to Sacramento County. Plaintiff was an employee of Brown. Brown made an oral agreement with defendant Lacey by which Lacey agreed to furnish trucks and drivers, furnish a crane with an operator and an oiler (driver of the truck on which the crane was mounted) to load the equipment, and to truck it to its destination.

On the day moving was to begin, the trucks arrived at the location of the equipment under the supervision of Kennedy, truck foreman for Lacey. On the way to the location, the crane broke down. When it failed to arrive, Green, Brown's supervisor, called Hall, Lacey's superintendent, by telephone. Hall told Green the crane had broken down, and suggested he get a crane from defendant Wonderly Construction Company. Green said: "[A]ll right, to go ahead." Hall called Wonderly, asked if they had a crane available; they said they had, and Hall asked that it be sent to the location of the equipment with an operator and an oiler. The crane arrived with Winkler, operator of the crane, and an oiler, both employees of Wonderly. It was a mobile crane, mounted on a truck. The crane itself consisted of a cab with a boom running out from the base of the cab, the boom being four braced angle irons forming a box with lines running from the cab over the end of the boom and down to the objects to be moved. The crane was equipped with two sets of lines, one known as a "fast" line, which was used for lifting light loads, and the other a heavy line used for lifting heavier loads.

Brown had three crews of five men on the scene, each under the direction of its foreman, Tate. Plaintiff was a member of one of the crews. After several pieces of equipment were loaded, operations were begun to load a large piece of machinery, weighing about 18 tons, called a drawworks, onto a truck. The drawworks was in the middle of two subbases which formed the base of an oil derrick when the derrick was raised, thus making a floor out around the drawworks. The "fast" line was not in use. It was mounted on the boom, drawn up nearly to the end of the boom so that only a foot to one and a half feet of the line together with a hook thereon which weighed about 60 pounds extended from the end of the boom. The "fast" line was held in place by a brake. The operator of the crane had control of it and released it by pressure from his foot on the brake. The crane was backed into position near the drawworks. The boom was then lowered to a point about the center of the drawworks and lines were dropped to be hooked onto it.

The Brown crews, including plaintiff, were on the floor. They hooked the line to the drawworks, after which one of the men on the floor signaled Winkler to lift the load. As the load was brought to bear on the cable, the front wheels of the crane truck came off the ground two or three feet letting the load down. As the wheels settled back, the drawworks raised about a foot and a half above the floor. Winkler continued to raise the boom, "the load overbalanced," and the drawworks swung over against the boom denting it about 6 inches. Several of the Brown men, including plaintiff, had remained on the floor to work after the drawworks had been removed.

Shortly after the boom was damaged, Winkler motioned to Kennedy. Kennedy walked to within 3 feet of Winkler who asked him to have Tate get his men off the floor. Kennedy, on the floor, hollered to Tate who was some 75 feet away. There was evidence that there was much noise at the time. It was very difficult to hear; there was so much noise hand signals were usually used in the operation. Without waiting for Tate to reach the floor, and without waiting for all the men to get off the floor, Kennedy told Winkler "to go ahead or that it was all clear, or words to that effect."

Winkler then moved the drawworks off the floor by having the oiler move the truck. He then started to lower the load to the ground, and while doing so the boom broke and collapsed, causing the drawworks to fall to the ground. When the boom collapsed, the "fast" line with the sinker and the hook attached to it, which had been hanging loose from the tip of the boom, swung out, whipped across the floor, struck plaintiff, knocking him to the floor and causing severe injuries.

The action is against Lacey and Wonderly. The motion of Wonderly for a directed verdict was granted on the ground Winkler was a fellow employee of plaintiff,—that is, Winkler and plaintiff were both employees of Brown; that plaintiff's injuries were caused by the negligence of his fellow employee; and that, therefore, the Industrial Accident Commission had sole jurisdiction. The motion of Lacey for a directed verdict was granted on the ground there was no proof of negligence on his part.

The Case Against Wonderly

Plaintiff-appellant urges that there was sufficient evidence to support a finding by the jury that Winkler was the employee of Wonderly, an independent contractor, and not a special employee of Brown, as the trial judge concluded in granting the motion of Wonderly. Wonderly counters that it was not an independent contractor; that Winkler was Brown's employee, and that it is not liable under the doctrine of *respondeat superior*. The parties appear to agree there was sufficient evidence that Winkler was negligent to require submission of that question to the jury.

[1] Labor Code, § 3353, defines an independent contractor as: "* * * any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." We think there can be no question but that Wonderly was an independent contractor. California Employment Commission v. Los Angeles etc. News Corp., 24 Cal.2d 421, 424, 150 P.2d 186; Anderson v. Badger, 84 Cal.App.2d 736, 741, 191 P.2d 768; Perguica v. Industrial Accident Comm., 29 Cal.2d 857, 859, 179 P.2d 812. The real question is whether there was evidence from which the jury could have concluded that Winkler remained an employee of Wonderly.

[2, 3] When an employer lends the services of an employee to a hirer for the operation of an instrumentality owned by the employer, together with the use of the instrumentality, without relinquishing to the hirer the power to discharge the employee, to go where and perform such work as the hirer directs, the legal inference is that, although the hirer directs the employee where to go and what to do in the performance of the work, the employee as the operator of the instrumentality employed in doing the work, remains, in the absence of an agreement to the contrary, the employee of the employer alone insofar as the manner and method of operating the instrumentality is concerned, and the negligence of the employee is held to be that of the owner, and not that of the hirer of the instrumentality. Billig v. Southern Pacific Co., 189 Cal. 477, 485, 209 P. 241; Peters v. United Studios, Inc., 98 Cal.App. 373, 378–9, 277 P. 156; Scrimsher v. Reliance Rock Co., 116 Cal.App. 500, 504–5, 2 P.2d 862; Lowell v. Harris, 24 Cal.App.2d 70, 76, 74 P.2d 551, Anno. 17 A.L.R.2d 1388. "In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it." 1 Rest. Agency, 501, § 227.

[4–6] A general employer may lend his employee together with an instrumentality in such a manner as to render the person to whom the employee is loaned the special employer for the time being and hence relieve the general employer from liability for the employee's negligence in the operation of the instrumentality. But to escape liability, the general employer must relinquish full control of the employee for the time being, it not being sufficient that the employee is partially under the control of the third person; and it is necessary to distinguish between authoritative direction and control and mere suggestion as to details or the necessary cooperation where the work furnished is part of a larger operation. Peters v. United Studios, Inc., 98 Cal.App. 373, 379, 277 P. 156; Lowell v. Harris, 24 Cal.App.2d 70, 76, 74 P.2d 551. "A continuation of the general employment is indicated by the facts that the general employer may at any time substitute another servant, that the time of employment is short, and that the lent servant has the skill of a specialist." 1 Rest., Agency, 501, § 227.

[7, 8] Applying these rules, it is manifest that the evidence was such as to warrant the jury in concluding that Wonderly was an independent contractor; that Brown was not a special employer; and that Winkler was the employee of Wonderly and not of Brown. There was no evidence of release of authoritative control by Wonderly. There was no express agreement that Wonderly should relinquish to Brown complete control over either Winkler or the crane. Wonderly did not confer on Brown the right to discharge Winkler. Brown, if dissatisfied with Winkler, might have asked Wonderly to provide another operator, but there was no power in Brown to discharge Winkler and put the crane under operative control of a man of its own. Wonderly might at any time have exercised its discretion and substituted some other operator in place of Winkler. The right of Brown—if it had such right—to tell Winkler what to load, when and where to go, the route to be taken in moving the crane,—did not give Brown any right of control of Winkler as to the manner and method of operating the crane. Moss v. Chronicle Pub. Co., 201 Cal. 610, 615, 258 P. 88, 55 A.L.R. 1258; Entremont v. Whitsell, 13 Cal.2d 290, 296, 89 P.2d 392; Lowell v. Harris, 24 Cal.App. 70, 79–81, 74 P.2d 551; 57 C.J.S., Master and Servant, § 566, P. 284. A direction to "do 'anything they wanted to take care of,'" does not necessarily indicate an intention by the general employer to surrender control of the employee. Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 229, 263 P. 799, 801.

[9] It may fairly be inferred that Wonderly was to do the complete job of loading the equipment onto the trucks. Operation of a crane is a distinct operation requiring the services of a crane specialist. Control of the crane and its operation was entirely in Winkler. Winkler testified he was in complete charge of the operation of the crane; the only instructions he received from Brown were what pieces of equipment they wanted moved next, or if they disassembled a piece to tie onto it to keep it from falling to the ground; he determined where the crane was to be located for the purpose of lifting a load, whether a load was too heavy, and whether the crane was sitting properly to lift a load; anything to be done by the crane was done under his direction; that Kennedy, Lacey's superintendent, told him on which truck to place a piece of equipment. No one on behalf of Brown gave Winkler any instructions in regard to the operation of the crane, or the manner in which the work done by the crane was to be performed, or as to keeping it in working order. Even though Winkler lifted equipment onto trucks for Brown, yet in the operation of Wonderly's crane Winkler was still doing just what Wonderly employed him to do, operate the crane. The giving of signals to Winkler was not the giving of orders, but of information; and obedience of the signals shows cooperation rather than subordination, and is not sufficient to show there has been a change of employer. Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480.

The services to be rendered by Winkler were for this one job, not for an indefinite period. Brown was not in the business of operating cranes. It did not move its own equipment when moving was necessary, but usually hired Lacey to load, move, and unload it. Operating a crane requires technical skill on the part of the operator—

a fact which the jury might have considered as making it inconceivable that the parties intended that Brown was to direct a specialist in a field in which it would have been wholly incompetent.

Wonderly paid Winkler for his services, not Brown. Wonderly billed Lacey for the use of the crane and the services of Winkler and the oiler. Lacey, in turn, billed Brown. Wonderly furnished the oil and gas for the crane and the truck on which it was mounted. It may fairly be inferred that Brown did not think Winkler was its employee, and that Winkler did not think Brown was his employer.

The jury might well have concluded that none of the indicia of the right of control by Brown was present. It could have found that Winkler remained in the exclusive employ of Wonderly at all times and that Brown not only had no right to control him in the manner he performed his work but, in fact, did not assert any such right, nor seek to direct him other than to point out to him the equipment to be loaded onto trucks.

On facts substantially similar to those in the present case, it has been held, as a matter of law, that the loaned employee remained the servant of the general employer. Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241; Preo v. Roed, 99 Cal.App. 372, 375–379, 278 P. 928; Pire v. Gladding McBean & Co., 55 Cal.App.2d 108, 113–14, 130 P.2d 143, 981; Clarke v. Hernandez, 79 Cal.App.2d 414, 179 P.2d 834.

Since it could reasonably have been concluded that Winkler remained the employee of Wonderly and did not become the employee of Brown, the question should have been left to the jury under appropriate instructions. Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 263 P. 799; Burns v. Jackson, 59 Cal.App. 662, 211 P. 821; Peters v. United Studios, Inc., 98 Cal.App. 373, 277 P. 156; Valdick v. LeClair, 106 Cal.App. 489, 289 P. 673; Scrimsher v. Reliance Rock Co., 116 Cal.App. 500, 2 P.2d 862; Madsen v. LeClair, 125 Cal.App. 393, 13 P.2d 939; Hilliard v. Fabricius, 10 Cal.App.2d 348, 352, 51 P.2d 1134; Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551; Anderson v. Abramson, 234 Iowa 792, 13 N.W.2d 315, 318; American Telephone & Tel. Co. v. Ohio Valley Sand Co., 131 W. Va. 736, 50 S.E.2d 884; Bellantoni v. Thomas & Buckley Hoisting Co., 203 App. Div. 412, 196 N.Y.S. 667.

We hold that the court erred in granting the motion of Wonderly for a directed verdict.

The Case Against Lacey

[10] The motion for a directed verdict in favor of Lacey was granted on the ground there was no proof he was negligent. Plaintiff urges the evidence was such as to compel submission of his case against Lacey to the jury. He says that apart from the negligence of Winkler, there was independent evidence Lacey was negligent. We are of the opinion this contention must be sustained. Kennedy was Lacey's truck foreman, "pusher," on the job. After the boom had been damaged Winkler motioned to Kennedy. Kennedy walked to within 3 feet of Winkler. Winkler asked him to have Tate get his men, including plaintiff, off the floor. Tate was some 75 feet away. Kennedy hollered to Tate "that Winkler had put a kink into his boom, and advised him to remove all his men off the floor in case of danger, or something to that effect." Kennedy heard Tate say something to the men, but not what he said. Several men "scattered" off the floor, but not all of them; plaintiff and one or two others did not leave the floor. There was much noise at the time, so much that hand signals were usually used in the operation. It was very difficult to hear. Kennedy himself did not make any attempt to warn the men to get off the floor. Without waiting for Tate to reach the floor, and without waiting for all the men to get off the floor, Kennedy told Winkler "to go ahead or that it was all clear, or words to that effect." Kennedy testified he knew when he gave the signal there were men still on the floor, and that Winkler could not see plaintiff because of the size of the drawworks. Winkler then moved the drawworks and the boom collapsed. This evidence was sufficient to compel submission to the jury of the question whether Kennedy exercised due care in signaling Winkler to proceed

before the floor was clear, and whether, if he failed to exercise due care, such failure was a proximate cause of the injuries sustained by plaintiff. The court erred in granting the motion of Lacey for a directed verdict.

Reversed.

SHINN, P. J., and WOOD, J., concur.

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114 Cal.App.2d 69

WIGHT v. CITY OF LONG BEACH et al.

Civ. 18931.

District Court of Appeal, Second District,
Division 3, California.
Nov. 7, 1952.

Action in mandate to compel city to grant a pension to widow of deceased police officer. The Superior Court of Los Angeles County, Hugh E. Brierly, Judge assigned, rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustained finding that discharge of duties as a member of police department aggravated a heart ailment and precipitated death of officer.

Judgment affirmed.

1. Municipal Corporations 🔑187(6)

The pension provided by city charter for dependents of a police officer whose death occurs as a result of a service connected injury or illness is payable where performance by officer of duties of his employment aggravates a heart ailment and precipitates his death, though officer performed only the normal duties of his employment.

2. Mandamus 🔑168(4)

In action of mandate to compel city to grant a pension to widow of deceased police officer, evidence sustained finding that performance of duties as member of police department aggravated a heart ailment and precipitated death of officer.

3. Workmen's Compensation 🔑568

Injury or death due to services in the normal course of employment is compensable, even though there is no unusual exertion or strain.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondent.

SHINN, Presiding Justice.

The city of Long Beach and certain of its officers appeal from a judgment based upon findings of a jury upon special interrogatories. The action was in mandate to compel the city and its officers to grant a pension to petitioner, widow of a police officer of the city. The jury answered affirmatively the questions (1) whether Mr. Wight received any injury or contracted any sickness as a result of the discharge of his duties as a member of the police department, (2) whether he died as a result of such injury or sickness, and (3) whether his services as a member of the department so aggravated a pre-existing injury or sickness, if any, as to accelerate such ailment and precipitate his death.

It is undisputed that the cause of death was disease of the heart from which Mr. Wight had suffered for a number of years. It is not questioned by appellants that there was substantial evidence that performance of the duties of his employment aggravated the ailment and precipitated his death. It is contended, however, that this is not sufficient to establish a right to a pension for the reason that Mr. Wight performed only the normal duties of his employment.

[1] The principal ground of the appeal is stated as follows: "The appellants contend that the performance of the ordinary and usual duties required of an employee do not constitute an injury, unless some hazard or some unusual strain accelerates and precipitates the death of the employee." They say further: "Work in and of itself does not constitute an industrial injury," that death is not due to the discharge of duties of a member of the police department

unless it results from overexertion or from unusual duties. All the extensive arguments are founded upon this erroneous theory. Appellants do not recognize the distinction between the right to compensation which is dependent upon proof of some accidental injury and the right to compensation for service connected aggravation and acceleration of illness. Subdivision 4 of § 187 of the Long Beach City Charter provides a pension for dependents of policemen whose death occurs (a) as a result of a service connected injury, or (b) as a result of a service connected illness. These provisions were considered in Wood v. Board of Police & Fire Pension Com'rs, 49 Cal.App.2d 52, 120 P.2d 898, and Gilman v. City of Long Beach, 111 Cal.App.2d 747, 245 P.2d 512, 513, the latter case involving the pension of a fireman's widow.

The arguments advanced by the appellants here are identical with those presented in the Gilman case, and the same authorities are relied upon. Gilman suffered from a heart condition which the jury found, in answer to special interrogatories, was so aggravated by the discharge of his duties as a fireman as to cause his death. The court said: "There was medical testimony that decedent's life was materially shortened by the stresses and strains of employment, and that decedent's heart disease was caused by such activity and its progress accelerated thereby." The judgment which awarded the widow a pension was affirmed. There was evidence of the same tenor in the present case. At the time he was appointed as a patrolman December 1, 1927, Mr. Wight passed a rigorous physical examination. During most of his service he was assigned to night duty, and he worked as supervisor and on patrol between midnight and 8:00 a. m.; he would come home very tense, and during the past two years of his life was unable to sleep more than 4 hours out of 24; he discovered that he had a heart condition in 1946; following exertion he had a pain in his chest which ran into the shoulder and left arm; he was given treatment, and there was medical testimony to the effect that exertion or stress would definitely increase the frequency and severity in his attacks, and that the lives of persons in such condition are shortened by exertion, emotional stresses and conflicts. Mr. Wight was advised to cut down on his activities; it appears that he did not do so, but undertook increased responsibilities after he was promoted to lieutenant. His health appeared to fail during the last year or two of his life. He had the responsibility of preparing the budget of the department which occupied him for two or three months. In February and March while he was working on the budget his face would get pale and his eyes would take on a rather dazed look. While he was working on the budget in February and March he continually brought his work home and he and Mrs. Wight worked on it at night until 1:00 o'clock and once until 4:00 o'clock in the morning. In March, 1949, he was assigned to break up some slot machines; these weighed over 100 pounds; there were eight of them and he would pick them up and drop them, and use a sledge hammer on them; he complained of pain, but continued with his work of prying the machines apart; while handling the supplies of the department he often lifted heavy boxes of ammunition and other boxes, with the result that he was subjected to pain and shortness of breath; he frequently negotiated a flight of stairs to and from the stockroom in the basement, an exertion that was detrimental to his condition. After a sleepless night he came to work complaining of pain and on the day preceding his death he had gone downstairs to the storeroom in the basement on several occasions. There was evidence that after performing other services he would be seen to be perspiring heavily, short of breath and extremely pale, and he complained of being extremely tired and of a pressure on his chest. In June, 1949, he was apparently suffering from a chest pain and was induced to sit quiet for about an hour and rest. He was very pale on that occasion. When he went home after a day's work he would lie down on the davenport and rest until dinner time. There was medical testimony, in response to questions describing some of Mr. Wight's activities, that they certainly would have a detrimental effect on his heart, and that there was a causal connection between his death and the exertion to which he was subjected on the preceding day, which, according to the evidence, had left him in an exhausted condition. There was other medical testimony in response to questions incorporating evidence as to Mr. Wight's appearance after he had used a sledge hammer to break up slot machines. The opinion was expressed that he suffered from a blood clot. In answer to a further hypothetical question incorporating evidence of Mr. Wight's activities and condition on the day preceding his death, a physician testified to the opinion that "the exertion contributed to the episode which terminated fatally." There was a vast amount of explanation given by the physicians on direct and on cross-examination as to the manifestations and progress of diseases of the heart. The expert witnesses for plaintiff held to the opinion that Mr. Wight died from a coronary artery disease and his death was materially hastened by the nature and extent of the services he rendered as a member of the police department. Physicians called by the defendants expressed opinions that Mr. Wight's heart condition would have progressed had he not been working at all, and that his services as a policeman did not cause his condition to develop, or contribute to his death.

[2] There was substantial medical testimony to justify the finding of the jury that the services of Mr. Wight aggravated his illness and precipitated his death. Moreover, the testimony of friends and associates as to their observations of the effects of Mr. Wight's work upon his condition, considered with the expert testimony as to the detrimental effect of strenuous effort, strain and worry upon one suffering from such a condition, furnished a logical basis for the finding.

[3] The principle is thoroughly established that injury or death is compensable if it is due to services in the normal course of the employment, even though there be no evidence of unusual exertion or strain. The argument of appellants that there was no evidence of any extraordinary or unusual effort which was the immediate cause of Mr. Wight's death evades this controlling principle. It is sufficient on this point to cite Lumbermen's Mutual Casualty Co. v. Industrial Acc. Comm., 29 Cal.2d 492, 175 P.2d 823, where the rule is stated, supported by many authorities.

The final point of appellants is that the court committed error in giving instructions which stated the law as we have stated it. There was no error. The same instructions were approved in the Gilman case.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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114 Cal.App.2d 122

SUSUMU IGAUYE v. HOWARD.

Civ. 18935.

District Court of Appeal, Second District,
Division 3, California.

Nov. 10, 1952.

Rehearing Denied Dec. 8, 1952.

Hearing Denied Jan. 8, 1953.

Action for damages for wrongful eviction of plaintiff from hotel premises leased from defendant and for conversion of plaintiff's property therein. The Superior Court of Los Angeles County, Samuel R. Blake, J., entered judgment for plaintiff and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held that provision of lease giving lessor option, in event of default, to declare lease to be at an end, and to re-enter premises without notice to lessee, was required to be exercised in accordance with statutory provisions requiring three days' notice.

Judgment affirmed.

1. Landlord and Tenant 🔑161(3), 180(6)

In action for damages for wrongful eviction of plaintiff from hotel premises leased from defendant and for conversion of plaintiff's property, wherein it appeared that lease provided that in event of default, lease should, at option of lessor, determine and be at an end, finding that allegations of specific paragraphs of answer relating to reduction of rent and nonpayment in allegation of abandonment were untrue, was a sufficient finding, and court need not have made findings particularly specifying the facts with respect to reduction of rent and allegation of abandonment.

2. Trusts ⚷257

Where plaintiff who was named as lessee in written lease of hotel premises brought action for wrongful eviction and for conversion of plaintiff's property, and defendant averred that plaintiff's father operated hotel and was in fact the real party in interest and that action might not be prosecuted in name of plaintiff, father was at most the beneficial owner of the lease, and the plaintiff as trustee of an express trust might prosecute the action in his own name. Code Civ.Proc. § 369.

3. Landlord and Tenant ⚷276

The right of re-entry referred to in statute providing that whenever right of re-entry is given to a lessor in any lease or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided by statute, refers to a provision in the lease for its termination by the lessor on default of the lessee, such as a failure to pay rent. Civ. Code, § 791.

4. Landlord and Tenant ⚷277(2)

Provision of lease of hotel premises that in event of default, lease should at the option of the lessor at once determine and be at an end, and that lessor might thereupon immediately re-enter and take possession of premises without giving any notice to lessee, did not ipso facto work a forfeiture of the leasehold for failure of lessee to pay rent, but lessor was merely given option to terminate which must have been exercised by giving of three days' statutory notice. Civ.Code, § 791.

5. Landlord and Tenant ⚷161(1)

Where lessor wrongfully evicted lessee from hotel premises, and, at time of eviction, premises contained furniture and furnishings belonging to plaintiff, lessor's wrongful act of taking possession of and using the personal property of lessee constituted conversion for which he might be held liable.

6. Trover and Conversion ⚷4, 5

"Conversion" is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein, and it is not necessary that there be a manual taking of the property, but showing of an assumption of control or ownership, or that alleged converter has applied the property to his own use is sufficient.

See publication Words and Phrases, for other judicial constructions and definitions of "Conversion".

7. Landlord and Tenant ⚷161(3)

Where lessor of hotel premises converted personal property of lessee when he wrongfully evicted lessee, demand by lessee for return of the property was not essential to maintenance of action for damages, since demand for return of property is not condition precedent to institution of action when possession was originally acquired by a tort. Civ.Code, §§ 1712, 1713.

8. Trover and Conversion ⚷16

Actual ownership of property involved is not necessary to maintenance of action by plaintiff for conversion, but it is sufficient if plaintiff had actual possession at time of alleged wrongful act.

9. Trover and Conversion ⚷44

Where property of plaintiff wrongfully converted by defendant was not as yet fully paid for by plaintiff, amount unpaid could not properly be deducted from award of damages against defendant, since plaintiff was still obligated to pay the balance owing for the property and his damage was its value.

10. Appeal and Error ⚷110

An order denying a motion for new trial is not appealable.

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A. Brigham Rose, Los Angeles, for appellant.

Knight, Gitelson, Ashton & Hagenbaugh, Los Angeles, and Leon J. Alexander, for respondent.

VALLÉE, Justice.

Appeal by defendant, Fred Howard, from a judgment for plaintiff in an action for damages for wrongful eviction and for conversion.

On April 13, 1948, defendants, as lessors, and plaintiff, as lessee, entered into a written lease of a hotel. The term was from May 1, 1948, to December 31, 1951. The lease contained a provision to the effect that in the event of default, it should at the option of the lessors "at once determine and be at an end."[1] The rent reserved was $1,800 per month. On February 8, 1949, by a writing, it was reduced to $1,550 a month, payable on the first of each month. On June 1, 1949, defendant verbally agreed to reduce the rent for June to $1,350, which was paid. On July 1st plaintiff asked for a further reduction. Howard refused, and demanded $200 additional for the month of June. Plaintiff did not, at the time of the demand, pay the July rent or the $200. Later that day, defendant evicted plaintiff and entered into a written lease of the hotel with another person. No notice to pay rent or quit was given to plaintiff.

The court found that on July 1, 1949, defendant Fred Howard "wrongfully, unlawfully and in violation of plaintiff's rights, entered said hotel, took possession of the whole thereof, changed the lock on the door of the office of said hotel, removed certain monies from the cash register of said hotel belonging to plaintiff, and forcibly excluded and evicted plaintiff from said hotel and the whole thereof," and ever since has excluded plaintiff. The court also found that on July 1, 1949, defendant Fred Howard converted to his own use certain personal property belonging to plaintiff.

The answer alleged that on July 1, 1949, plaintiff had not paid the rent for June, and in July declared he had no intention of paying the rent, and that he would not pay any rent thereafter. The court found that these allegations are not true by referring to the numbered paragraph of the answer.

[1] Defendant contends the court should have made specific findings, particularly specifying the facts with respect to the reduction of the rent and the allegation of abandonment. The finding that the allegations of the specific paragraph of the answer in which these allegations were made are untrue is a sufficient finding. Bourke v. Frisk, 92 Cal.App.2d 23, 32, 206 P.2d 407. Further, the specific finding that defendant wrongfully evicted plaintiff implies that plaintiff did not abandon the lease.

[2] The hotel was operated by plaintiff's father. Defendant appears to contend that the father was in fact the real party in interest, and that the action may not be prosecuted in the name of plaintiff. Assuming the facts to be as urged by defendant, the father was the beneficial owner of the lease, and plaintiff a trustee of an express trust and may prosecute the action in his own name. Code Civ.Proc. § 369; Earl Fruit Co. v. Herman, 90 Cal.App. 640, 645, 266 P. 592.

Defendant next contends that by virtue of the provisions of the lease we have quoted in the margin, the lease was *ipso facto* terminated on July 1, 1949, by reason of the failure of plaintiff to pay the July rent on that day. He says he was not required to give a notice to pay rent or quit. Plaintiff was evicted early in the day on July 1st and before the day was over defendant had executed a written lease of the hotel to another.

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[1] The provision read: "It is further expressly understood and agreed that each and all of the provisions of this lease are conditions precedent to be faithfully and fully performed and observed by the said party of the second part to entitle him to continue in possession of said premises hereunder, and that if any default be made either in the payment of rent or in the observance, payment or performance of any of the provisions, terms or conditions hereof, then this lease shall, at the option of the party of the first part, at once determine and be at an end, and the party of the second part shall be deemed to have abandoned and forfeited all of his rights herein, and the party of the first part, his successors or assigns, may thereupon immediately reenter and take possession of said premises and the whole thereof without giving any notice whatever to the said party of the second part. A waiver by the party of the first part of any default by the party of the second part in the performance of any of the covenants, terms and conditions hereof, shall not be considered or treated as a waiver of any subsequent or other default as to the same or any other matter."

[3, 4] Civil Code, § 791 provides: "Whenever the right of re-entry is given to a * * * lessor in any * * * lease or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in sections 1161 and 1162, Code of Civil Procedure". The right of re-entry referred to in section 791 refers to a provision in a lease for its termination by the lessor on default of the lessee, such as failure to pay rent. Earl Orchard Co. v. Fava, 138 Cal. 76, 79, 70 P. 1073. A lessor of demised premises is not entitled to take possession by forcible entry under a provision of a lease that in case the rent is not paid it shall be lawful for him, "without previous notice or demand, to reenter the demised premises and the same peaceably to hold and enjoy thenceforth as if this lease had not been made." California Products, Inc., v. Mitchell, 52 Cal.App. 312, 198 P. 646. See also: J. B. Hill Co. v. Pinque, 179 Cal. 759, 178 P. 952, 3 A.L.R. 669. The provision of the lease under consideration did not *ipso facto* work a forfeiture of the leasehold for the failure of the lessee to pay rent, but only gave the lessor the right at his option to terminate, which the court in Standard Livestock Co. v. Pentz, 204 Cal. 618, 630, 269 P. 645, 650, 62 A.L.R. 1239, said "amounts to no more than the right on the part of the landlord to terminate the lease in the manner provided by law; that is to say, in accordance with the provisions of section 1161 et seq. of the Code of Civil Procedure. It is so expressly provided in section 791 of the Civil Code." In Lydon v. Beach, 89 Cal.App. 69, at page 74, 264 P. 511, at page 513, it is said: "His lease provided, and he agreed, that in case he should at any time be in default in the payment of his rent, then it shall be lawful for the lessor to re-enter the premises and remove all persons therefrom. But this covenant in the lease does not justify the landlord in re-entering and dispossessing the tenant until the landlord shall have given a three days' written notice to the tenant to pay the rent or else quit the possession. Section 791, Civ.Code."

[5–7] At the time defendant evicted plaintiff, there were furniture and furnishings in the hotel which belonged to plaintiff. Defendant took possession of them, and used them in the operation of the hotel through the new lessee. Contrary to defendant's contention, the wrongful act of taking possession of and using the personal property constituted conversion. Defendant assumed control of the property. It was not returned to plaintiff. Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. An intention to convert must be shown. Zaslow v. Kroenert, 29 Cal.2d 541, 549–550, 176 P.2d 1; Dodge v. Meyer, 61 Cal. 405, 420–421; Mears v. Crocker First Nat. Bank, 84 Cal.App.2d 637, 643–644, 191 P.2d 501. Defendant says a demand for return of the property was essential to the maintenance of the action. A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case. Civ.Code, §§ 1712, 1713; United Bank & Trust Co. v. Powers, 89 Cal.App. 690, 694, 265 P. 403.

[8] The fact, if it be a fact as contended, that plaintiff's father and not plaintiff was the owner of the converted property, is not material. Plaintiff had possession. It is not necessary that the plaintiff in an action for conversion be the owner of the property; it is sufficient if he had actual possession at the time of the alleged act. Fletcher Aviation Corp. v. Landis Mfg. Co., 95 Cal.App.2d 905, 908–909, 214 P.2d 400.

[9] Defendant, in his reply brief, for the first time asserts that the evidence is insufficient to justify the award of damages. Notwithstanding the rule that a point made for the first time in a reply brief will not be considered, we have examined the record

and find that the award is amply sustained. Defendant says that because evidence of the value of the lease came from plaintiff's father the evidence was incompetent and inadmissible. The argument is patently fallacious. He also says that because the personal property was not fully paid for the amount unpaid should have been deducted from its value. Plaintiff was still obligated to pay the balance owing for the property and his damage was its value.

[10] Since there is no appeal from an order denying a motion for a new trial, defendant's appeal therefrom is dismissed. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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114 Cal.App.2d 192

PEOPLE v. CHAMBERLAIN.

Cr. 777.

District Court of Appeal, Fourth District, California.

Nov. 12, 1952.

Defendant was convicted of an act of sexual perversion. The Superior Court, San Diego County, William A. Glen, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held evidence was sufficient to establish the corpus delicti and to support jury's finding that the offense charged had been committed.

Order denying new trial affirmed.

1. Sodomy 🔑6

In prosecution for act of sexual perversion, evidence was sufficient to establish corpus delicti and to support jury's finding that offense charged had been committed. Pen.Code, § 288a.

2. Criminal Law 🔑829(1)

In prosecution for act of sexual perversion, refusal of requested instruction was not prejudicial error, in view of other instructions given on subject and of evidence produced. Pen.Code, § 288a.

Edgar G. Langford, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant Chamberlain and his co-defendant Elkington were convicted by a jury of the crime of violating section 288a of the Penal Code. Chamberlain was granted conditional probation. He appeals from an order denying his motion for new trial and argues (1) that the evidence is insufficient to support the verdict; and (2) that the court erred in refusing to give a requested instruction.

The evidence shows that Elkington had been drinking to some extent and had retired to a motion picture show house. While he was sitting there defendant seated himself next to Elkington and began fondling his leg and private parts. Defendant suggested a ride in defendant's car. They proceeded to a secluded spot in the city and parked the car. Police officers approached in their automobile. Their lights shone upon the parked car. They recognized only one man sitting erect on the right side of the seat. After passing defendant's car they turned about and came up to it from the right side. They got out of their car, approached the right front window, and by means of a flashlight they saw defendant Chamberlain's "head come up from the vicinity of Elkington's lap". Without relating further gruesome details, the circumstantial evidence produced by the prosecution was clearly sufficient to show a violation of section 288a of the Penal Code, as charged. The officers requested defendants to roll down the glass window and to step out of the car. Elkington stepped out on the right side and Chamberlain on the left. Later, according to the police officers, Elkington admitted the act denounced by section 288a, but Chamberlain denied it. At the police station Elkington signed a statement to this effect. Defendant Chamberlain signed one in which he admitted he met Elkington at the picture show and stated he had asked him to go for a ride; that they drove to the park, stopped, "played around for a while, and the sailor didn't want to do anything, so I didn't". At the trial defendant Chamberlain accused Elkington of being the aggressor, and testified that he went to the park for the same purpose Elkington went there; that neither wanted to be the active agent and so they were just about to leave when the officers came up.

[1] The main contention is that there was not sufficient evidence to establish the corpus delicti. Defendant relies principally upon People v. Jordan, 24 Cal.App.2d 39, 74 P.2d 519; and People v. Hickok, 96 Cal.App.2d 621, 216 P.2d 140. The circumstances and factual situation presented in the Jordan case fall far short of the showing here made regarding actual copulation. The Hickok case establishes the law that complete penetration of the mouth is not necessary, but any penetration, however slight, is sufficient to constitute a violation of the code section. The evidence here related, both direct and circumstantial, is sufficient to establish the corpus delicti and support the jury's finding that the offense charged had been committed. People v. Milo, 89 Cal.App.2d 705, 201 P.2d 556.

A closer question arises as to the second point. The court refused, as covered, an instruction which in effect would have told the jury that before the defendant could be convicted the evidence must show that the sexual organ actually penetrated his mouth. This instruction was a more specific instruction than the general instruction given on the subject. The information charges defendant with sex perversion as denounced by the statute. The court instructed the jury that the burden was upon the people to prove every element of the offense as charged. It read section 288a of the Penal Code in the language of the statute and it further instructed the jury that the offense thus defined "consists of, and its commission requires, the uniting or the joining of the mouth of one person with the sexual organ of another".

[2] While the instruction might well have been given People v. Hickok, supra; People v. Milo, supra, in view of the other instructions given on the subject, and in view of the evidence produced, no prejudicial error resulted.

Order denying new trial affirmed.

BARNARD, P. J., concurs.

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114 Cal.App.2d 95

PEOPLE v. KING et al.

Cr. 2773.

District Court of Appeal, First District,
Division 1, California.
Nov. 10, 1952.

Defendants were convicted of first-degree burglary. The Superior Court in and for the County of San Mateo, Edmund Scott, J., entered judgment of conviction, and defendants appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Burglary 🔑41(1)

Evidence was sufficient to sustain the convictions for first-degree burglary. Const. art. 6, § 4½.

2. Criminal Law 🔑739(2), 741(2)

In prosecution for first-degree burglary, evidence upon questions of fairness of witnesses' first identification of one defendant and truth of other defendant's alibi was for jury.

3. Criminal Law 🔑1159(5)

In prosecution for first-degree burglary, where implied findings of jury that one defendant had been properly identified and that alibi of other defendant was untrue were sustained by credible, substantial evidence, such findings were binding upon the District Court of Appeal.

4. Criminal Law ⚿1169(5)

In prosecution for first-degree burglary where police officer brought issue of money, apparently found on defendants after burglary, into the prosecution on several occasions after the trial court had ruled that such evidence was inadmissible, did not constitute prejudicial error in view of fact that on all occasions when objection was made the court gave a proper cautionary instruction to the jury.

5. Criminal Law ⚿663

In prosecution for first-degree burglary, refusal to allow defendant to read to jury police report, which had previously been admitted into evidence and contained description of the bandit as given the police by the prosecution's witnesses and which showed minor discrepancies between such report and testimony given at trial, was not an abuse of trial court's discretion in view of fact that judge stated that he feared improper inflections might be placed upon certain words and told jury that they could take the document into the jury room.

6. Criminal Law ⚿1169(12)

In prosecution for first-degree burglary, admission, on theory that defendant's answers thereto constituted admissions, of certain narrative statements of police inspector which otherwise would have been inadmissible as hearsay, if error, was not prejudicial in view of facts that the examinations were neither lengthy nor insistent, that defendants had been correctly advised of their rights before such questioning started, and that the trial court correctly instructed on the limitations of such evidence.

7. Criminal Law ⚿369(2), 1137(5)

In prosecution for first-degree burglary, evidence that one defendant had been in county jail prior to time of burglary and that other defendant had visited him there and picked him up upon completion of his term was properly admitted to show friendly relationship that existed between the defendants in view of fact that counsel for both defendants stipulated that designated jailer would testify to such visits, and that visiting defendant's counsel, in interrogating his client, voluntarily brought out such fact.

8. Criminal Law ⚿698(1)

In prosecution for first-degree burglary, admission of evidence that one defendant had twice used an alias in different cities after the burglary was not error in view of fact that no objection was made thereto at trial.

9. Criminal Law ⚿698(1)

Even if testimony upon use of fictitious name by defendant after commission of crime should be excluded, timely and proper objection must be made at trial.

10. Criminal Law ⚿787(1)

In criminal prosecution where defendant does not testify on his own behalf, an instruction that failure to deny or explain damaging evidence does not warrant a presumption or inference of guilt should be given if offered, and its refusal will be error.

11. Criminal Law ⚿1173(2)

In prosecution for first-degree burglary, where one of the two defendants did not testify on his own behalf, failure to instruct that such defendant's failure to deny or explain damaging evidence would not warrant presumption or inference of guilt, even if error in absence of a proffered instruction, was not prejudicial.

12. Criminal Law ⚿1173(5)

In prosecution for first-degree burglary, where prosecuting attorney stated to jury that he thought the court would instruct them that they could take flight into consideration, but defendant's counsel objected to characterization of defendant's change of residence as flight, and the trial court then stated that it would not give an instruction upon that subject, failure to give such instruction was not error. Pen. Code, § 1127c.

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Thomas C. Vassar, San Francisco, for appellant King.

Jack L. Scott, in pro per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthurst, Dep. Atty. Gen., Louis De Matteis, Dist. Atty., Redwood City, Leo Englert, Redwood City, of counsel, for respondent.

PETERS, Presiding Justice.

Patrick King and Jack Scott were jointly charged with armed robbery and armed burglary. The robbery charge was later dismissed. After a lengthy second jury trial, the first jury having disagreed, both defendants were found guilty of first degree burglary. Both appeal. Both defendants were represented by counsel at the trial, but both appealed *in propria persona*. Defendant King subsequently secured the services of an attorney, but defendant Scott presents his own appeal.

The charges involved grow out of the burglarizing of an Andrew Williams Store in San Mateo, on the evening of September 24, 1950. Several months later the two defendants were separately arrested, King in San Francisco, and Scott in Los Angeles, brought to San Mateo County and charged with the offense, and, on their second trial, convicted.

[1] Both appeal. They both strenuously attack the sufficiency of the evidence of identification, and jointly and severally attack the judgment on various other grounds. We are convinced that the evidence is sufficient to support the judgment, and that, although some errors occurred during the trial, such errors were minor in character and did not result in a miscarriage of justice. Under Article VI, section 4½ of the Constitution, they do not require or permit a reversal.

At the trial three clerks and the assistant manager of the store positively identified King as one of the burglars, and the three clerks positively identified Scott as the other burglar. The assistant manager did not identify Scott.

The burglary occurred under the following circumstances: The three clerks—James Alston, John Hurn and Maurice Agrella—at about 10:30 p. m. on the night in question were locking up and leaving the store when two men, later identified as King and Scott, with handkerchiefs over their faces and guns in their hands, ordered the clerks back into the store. The bandits then escorted the three clerks, at gun point, to a storeroom adjoining the office located on the mezzanine floor. At this time the main floor of the store had two of its eight banks of fluorescent lights lit, the storeroom was lighted by a 60 watt globe, and the adjoining office, the door of which was open, was fully lighted with fluorescent lights. The two bandits ordered the clerks to open the safes, but none of them had the combinations. The bandits, using threats, demanded the name of any employee who could open the safes, and the name of Frank Johnson, the assistant manager, was mentioned. After some further threats it was decided by the bandits that Hurn should call Johnson and tell him that the refrigeration system of the store had failed, in order to entice Johnson to come down to the store. Alston testified that during this period he was but two feet from the bandits and that the taller one (later identified as King), during the conversation, removed the handkerchief from his face, so that Alston got a good view of him.

The taller bandit left the room with Hurn to make the telephone call to Johnson. The remaining bandit then ordered the other two clerks to stand with their faces to the wall of the storeroom, and later permitted them to sit down and smoke. Alston testified that during this period he was able to take three or four glances at the bandit who was on guard.

Hurn testified that, after he left the storeroom with the taller bandit, the latter told him to "cool off" for a few minutes before making the phone call. During this "cooling off" period the bandit smoked a cigarette, and, in doing so, lowered the handkerchief guarding his face, so that Hurn got a good look at him. Under coercion Hurn then telephoned Johnson and told him the story about the refrigeration plant. The bandit ordered Hurn to stand by the door to meet Johnson, threatening to kill Hurn if he made a false move. When Johnson arrived he was admitted by Hurn and immediately the bandit ordered the two, at gun point, to go upstairs. Hurn was ordered into the storeroom with the other two clerks, and Johnson was taken by the taller bandit into the office. There, as a result of threats, he opened the two safes, and, upon orders of the bandit, placed their contents in two wastebaskets. It was stipulated that the bookkeeper of the store, if called, would testify that there was $13,300.26 in the safes, of which six to eight thousand dollars was in cash and the balance in checks. During this period this bandit kept his face partially covered with his handkerchief, but Johnson was able to get three or four good glances at him from a distance of about ten feet. When the safes were emptied, Johnson started towards the storeroom and the taller bandit started towards the safes. When the two passed, Johnson was able to get a good look at the taller bandit.

The bandits then tied the four men up with tape and rope, during which time Johnson got a fleeting glimpse of, and Hurn got a good look at, the smaller bandit. The bandits then left, taking the money and checks with them. The victims soon freed themselves and called the police.

At the trial Alston, Agrella and Hurn positively identified King as the taller bandit, and Scott as the shorter one. Johnson unequivocally identified King but was unable to identify Scott.

Both appellants attack the evidence of identification. This is their main ground of appeal. Scott correctly points out that all the witnesses testified that the shorter bandit kept his face covered at all times so that his face from his nose to his chin could not be seen. Admittedly both bandits wore hats pulled down low on their heads, obscuring the brows and eyes. The witnesses were all somewhat obscure about the clothing worn by the two bandits. The physical descriptions of the two bandits given by the witnesses to the police generally fit the two appellants, except that such descriptions show that the shorter bandit was afflicted with pimples or pock marks on his cheeks, and Scott claims that he is free of such blemishes. Scott also claims that the courtroom identifications of him should be given little weight because of the method used by the police in getting the clerks to identify him after his arrest.

[2, 3] The evidence shows that after the two men were arrested, King was identified by the three clerks in a fairly conducted police lineup held in the San Francisco jail where he was taken upon his arrest. But the identification made of Scott, prior to trial, was not conducted in the same manner nor with the same degree of fairness. Scott was brought to the San Mateo jail after his arrest and placed alone in a room. The witnesses were then ushered into an adjoining dark room from which they could see Scott. The witnesses were told that the police had picked up a suspect and wanted to see if the witnesses could identify him; in fact, one of the clerks testified that they were told to go in and identify the man. After this preview, Scott was removed to the county jail, and was placed in a true police lineup. The three witnesses then came in singly and positively identified him. This procedure certainly subjected the lineup identification of Scott to suspicion. This, however, was a question for the jury. The witnesses unequivocally identified the appellants at the time of trial. They were subjected to searching cross-examination on the identification issue, during which the facts relating to the methods that had been used to secure the original identifications were fully developed. Nevertheless, the jury believed the court made identifications. This created a conflict, the resolving of which was entirely a jury question. The implied findings of the jury on this issue, being supported by credible, substantial evidence, this court cannot and should not interfere.

King's main defense was an alibi. King, his sister, his mother and his half brother testified that King was at home on the night of September 24, 1950, celebrating his sister's birthday. All of the witnesses testified in detail as to the occurrences of that evening and gave reasonable explanations of why they remembered them. Their stories, if believed, would have established a complete defense. But they were not believed. Their truth or falsity were for the jury. Its implied finding that the stories were untrue is binding on this court.

Both defendants made certain express and implied admissions, after being taken into custody, to Inspector Reznik of the

San Francisco police department who had been assigned to assist the San Mateo police on the case.

When Reznik questioned King in San Francisco, King stated: "I didn't pull any stickups here." After being identified in the police lineup he refused to explain to Reznik where he had been on the night of September 24, 1950. When questioned about a man posing as a police officer who, after the burglary, searched the home of King's sister presumably looking for the proceeds of this robbery, King immediately stated that Reznik must have been talking to Sherman Arnold, later convicted of murder, and King thereupon, cursed Arnold for talking. Then King refused to answer any further questions about that episode.

Scott was picked up late in November, 1950, in Los Angeles at the general delivery window of the post office. There is evidence that, after the robbery, he adopted one alias in Los Angeles and another in San Francisco, and that King had visited him in Los Angeles before the arrest. Reznik went to Los Angeles to interview the suspect. He asked Scott if he knew what case he was being held on (admittedly Scott had not been informed by the Los Angeles police of what case was involved), and Scott answered "I think so." When asked if he thought it was because of Pat King's arrest, he replied "Maybe." He stated that he was living in Los Angeles to get away from certain "characters" in San Francisco, but stated that he was not trying to get away from King, and smiled when asked if he was trying to evade the police. He evaded answering why he was receiving mail at the general delivery window rather than at his apartment, admitted that he had used an alias in Los Angeles, stated that King had visited him in Los Angeles during October, 1950, and claimed that he, Scott, had come to Los Angeles to have a scar removed from his face and to have some dental work done. When asked where he was on the night of September 24, 1950, he answered: "I can't answer that question, Max, until I get up there and see Pat [King]." He claimed to remember where he was that night, but refused to answer when directly accused of being a participant in the burglary. He told Reznik that his brother, who had also been picked up in Los Angeles, was a "good kid" and "doesn't go the same route I do." He admitted that he had known King for about six years, and that King had visited him in the county jail of San Francisco where he was incarcerated prior to the burglary. On the plane returning to San Francisco, Reznik and Scott talked about narcotic addicts, and their unpredictable actions. Then Reznik asked Scott "Why did you team up with King in this case when you knew he was using narcotics?" Scott replied: "I should have known better. Every time he takes some he flips his lid." Reznik then informed Scott that there would be a lineup at San Mateo when they arrived, and asked what Scott intended to do if identified. Scott replied that if he was identified, he wanted to talk to King, and then "I will get it over with." After Scott had been identified in the lineup he and King were brought together in the presence of the officers. Scott told King how he had been picked up in the post office in Los Angeles, whereupon King called Scott a "chump." Scott refused to further discuss the case and demanded a lawyer.

Sherman Arnold, at the time of the trial a convicted murderer, was called by the defendants as their witness in the hope that he would confess that he and his brother-in-law had committed the crime. Arnold somewhat resembles King, and the brother-in-law has some of the physical characteristics of Scott. Arnold answered a few innocuous questions but, on the ground that his answers might incriminate him, refused to tell whether or not he had committed the crime here involved. Arnold has since filed an affidavit with this court purporting to admit the commission of the offense here involved, and King has moved that this be considered as new and additional evidence on his appeal. The motion was denied and the affidavit called to the attention of the district attorney, the attorney general, the governor, and the Adult Authority.

[4] In addition to challenging the sufficiency of the identification, an issue already

discussed, appellants make other claims for a reversal. They charge that Reznik, after the trial court had ruled in an unreported conference in chambers that certain evidence was inadmissible, constantly referred to that issue in his testimony. This evidence had to do with some money, apparently in the possession of appellants after the burglary. The ruling of the court, its grounds, and the exact nature of the evidence proffered by the prosecution and excluded by the court do not clearly appear, because the proceedings in chambers were not reported. This practice of not having reported conferences involving rulings by the court is not to be commended, preventing as it does the preservation of a complete record. It is clear, however, that on the prior trial Reznik had made many references to this money, and it is equally clear that the trial court on the present trial ruled and informed counsel and Reznik that no reference to this money would be permitted. Nevertheless, the prosecutor, and Reznik, on several occasions, made some reference to this money. Reznik, who was following the transcript from the first trial during his testimony, would volunteer such statements as: "I am not going to speak of money and I will try to get away from it," or that he couldn't "repeat" certain conversations because they referred to "money." Once when asked by the prosecutor about a certain conversation had with Scott he stated: "There I go into the money again," and when told by the court to "leave that out," Reznik asked: "What are we going to do with all the money?" A reading of Reznik's testimony indicates that this experienced police officer did bring this money issue into the case on several occasions under circumstances that suggest that he was overly zealous to get this issue before the jury in violation of the court's ruling. This was undoubtedly improper and constitutes error. But on most of the occasions that this occurred, and on all occasions when objection was made, the court gave a proper cautionary instruction to the jury. Under these circumstances, the error was not prejudicial.

[5] Appellant King next complains that he was prevented from reading to the jury a police report previously admitted into evidence. Early in the trial a police report was introduced on behalf of King and used later to check the description of the bandits as given to the San Mateo police by the clerks with the description given at the trial. It was also used during the cross-examination of Johnson to refresh his recollection about which of the four eyewitnesses had given the descriptions to the police. Much later in the trial counsel for King requested permission to read this police report to the jury. The prosecutor objected that such procedure would take time, that the document spoke for itself, and that the jury was entitled to take it into the jury room. The judge then stated that he feared improper inflections that might be placed on certain words if read by counsel, told the jury that they could take the document into the jury room, and denied the request to read it. An examination of this police report shows some discrepancies between the information there contained and the evidence given at the trial, but it also shows that such discrepancies were minor. Whether the document was taken into the jury room or not (it was one of the only two documents, other than photographs, introduced into evidence) does not appear, but it is quite apparent that the fact that discrepancies existed was made fully known to the jury. No request was made to read the document when it was introduced and used in examination, the request coming much later in the trial. Under the circumstances it was within the discretion of the trial court to deny the request.

[6] Appellant King contends that the trial court erroneously admitted, on the theory that this appellant's answers constituted admissions, certain narrative statements of Inspector Reznik that otherwise would have been inadmissible because of the hearsay rule. This practice of using conversations between the police and the suspect in which narrative statements are made by the interrogator containing what otherwise would be inadmissible hearsay in order to secure an admission, at least where a claim of privilege is made, has recently been condemned by the Supreme

Court. People v. Simmons, 28 Cal.2d 699, 172 P.2d 18. In that case the court stated, 28 Cal.2d at page 717, 172 P.2d at page 28: "Another objection to this form of evidence is that there is placed before the jury under the guise of an accusatory statement a vast amount of hearsay testimony otherwise utterly inadmissible. Lengthy statements are taken by the police from third persons who may or may not thereafter be witnesses. * * * The defendant, under arrest, is then asked to read the statement. If it contains indications of his guilt and he responds with other than a flat denial, the statement is then put in evidence as an accusatory statement. Although the jury may properly be cautioned to receive it, not as substantive evidence in proof of the facts asserted but merely as a basis of showing the reaction of the accused to it, the fact is that a lengthy transcript containing any amount of extraneous matter apart from the direct accusation is read into the ears of the jury and the matter remains in their mind during their deliberations."

While the precise holding of the cited case was that such statements should be barred when they are responded to with a claim of privilege, there is a dictum to the effect that without reference to the reply of the accused, accusatory statements and responses thereto should be viewed "with great caution," and should be excluded "if the police questioning has been insistent" or "if it appears that a great mass of extraneous hearsay matter will be placed before the jury through this device * * * unless, at the time of questioning, the defendant has been clearly advised that his reaction can be held against him as an admission." 28 Cal.2d at pages 718–719, 172 P.2d at page 29.

We have carefully examined the testimony of Reznik as to these conversations, not only as they relate to King but also as to Scott. Undoubtedly some hearsay that would otherwise have been inadmissible, was thus introduced into evidence. But such examination discloses that the examinations here involved were neither lengthy nor insistent, and the defendants were correctly advised of their rights before the questioning started. The trial court correctly instructed on the limitations of such evidence.

It should be pointed out also that in the Simmons case, where the accused when questioned claimed his privilege, and where the otherwise inadmissible hearsay thus admitted was much more extensive than is here involved, the court held the error, under the facts, to be nonprejudicial. Moreover, Mr. Justice Shenk, in a concurring opinion, in the Simmons case, pointed out that before such error will be considered, a proper objection must be made in the trial court, 28 Cal.2d at page 723, 172 P.2d at page 31, and this view has been followed in two appellate court cases. People v. Stepp, 82 Cal.App.2d 49, 185 P.2d 417; People v. Showers, 90 Cal.App.2d 248, 202 P.2d 814; see, generally, on this entire subject, People v. Peterson, 29 Cal.2d 69, 173 P.2d 11; People v. McGee, 31 Cal.2d 229, 187 P.2d 706; People v. Bob, 29 Cal.2d 321, 175 P.2d 12. Whether proper objections were here made does not clearly appear because some of the objections and rulings were made in unreported conferences in chambers. But, if it be assumed that proper objections were made at the trial, and even though there may have been some minor errors in the rulings, there was nothing that approaches the errors discussed in the Simmons case. If the errors there were not prejudicial, they could not possibly have been prejudicial in the present case.

[7] Appellants also complain of the proof by the prosecution that prior to the burglary Scott had been incarcerated in the county jail, and of the prosecutor's comment thereon. This evidence and comment were to the effect that some time before the burglary Scott had been in the county jail, and that King had visited him there and picked him up upon the completion of his term. This evidence was properly admitted to show the friendly relationship that existed between the two defendants, and the fact that the place of meeting was the county jail was incidental. The jury was carefully and properly instructed that such evidence should not be considered in ascertaining the character

of the defendant Scott. Moreover, during the trial, counsel for both defendants stipulated that if a designated jailer were called as a witness he would testify that King visited Scott five or six times while the latter was incarcerated, and called for him upon his release. King's counsel, in interrogating his client, voluntarily brought out the fact that King visited Scott while the latter was serving six months for passing a bad check. Under these circumstances, there was no error in the admission of this evidence.

[8, 9] Scott next complains of the admission of evidence that after the burglary he had twice used an alias, once in San Francisco and once in Los Angeles. No objection was made at the trial to the introduction of this evidence. There are several cases holding that evidence of use of a fictitious name, when objected to, cannot be shown against a defendant in a criminal case, at least on cross-examination of the defendant, because it unduly degrades the defendant. People v. Mohr, 157 Cal. 732, 109 P. 476; People v. Fleming, 166 Cal. 357, 136 P. 291; People v. Frank, 71 Cal.App. 575, 236 P. 189. However, in a later decision in the Frank case, 75 Cal.App. 74, 241 P. 924, the court explained its prior holding as merely being a limitation on the cross-examination of defendant. The court stated, 75 Cal.App. at page 77, 241 P. at page 926: "Under these circumstances there was no error in admitting the evidence complained of, as his statement giving a false name was made after the offense had been committed and evidently with knowledge on appellant's part of its commission. It must be considered, in connection with, and as a part of his attempted flight, after he, with a stolen pin in his possession, found himself in the presence of the officers of the law. As was said in People v. Cox, 29 Cal.App. 419, 422, 155 P. 1010, 1011: 'When a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and concealment, tends to show a consciousness of guilt, * * * arising from other established facts.'"

Certainly, even if such testimony should be excluded, timely and proper objection must be made. People v. Williams, 72 Cal. App. 52, 236 P. 355; see, generally, People v. Pedone, 35 Cal.App. 452, 170 P. 170.

[10, 11] On the trial King testified on his own behalf, but Scott did not. The prosecution twice briefly commented on Scott's failure to testify. Although the record does not show that such an instruction was offered, appellants complain of the failure of the court to instruct on its own motion that failure to deny or explain damaging evidence does not warrant a presumption or inference of guilt. Undoubtedly such an instruction, if offered, should have been given, and its refusal would have been error. People v. Adamson, 27 Cal.2d 478, 165 P.2d 3; People v. Greenberg, 73 Cal.App.2d 675, 167 P.2d 214. But in both the cited cases the error was held not to be prejudicial. In the Adamson case, 27 Cal.2d at page 490, 165 P.2d at page 10, the following was stated:

> "The jury, however, is concerned with the scope and nature of the consideration that it may give defendant's failure to explain or deny incriminating evidence, and in the present case should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.
>
> "The failure to give such an instruction was not prejudicial, however. It appears from the evidence that defendant could reasonably be expected to explain or deny all evidence presented. * * * His failure to explain or deny

this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable."

Thus, even if it was error for the trial court not to have instructed on this issue even in the absence of a proffered instruction, such error could not have been prejudicial.

[12] Scott also complains of the failure of the court to instruct the jury on the effect of flight as required by section 1127c of the Penal Code. That section provides that where flight is relied upon as tending to show guilt "the court shall instruct the jury substantially as follows:

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." The evidence shows that after the burglary Scott went to Los Angeles to live. When the prosecution, in its argument to the jury, sought to characterize this change of residence as "flight," and started to say "the Court will, I believe, instruct you that flight can be taken into consideration by you—" counsel for appellant objected to the characterization as "flight," and the court thereupon stated that it would not give an instruction on that subject. Under these circumstances it is hard to see how any error was committed. The instruction, if given, would have been adverse to the interests of this appellant. The refusal to give it could not have been prejudicial, but was in fact favorable to appellant.

Other minor contentions are made. None requires comment. This case turns upon the identification of the two defendants by the victims of the burglary. That identification, at the trial, being positive and clear, and having been believed by the jury, the minor errors that occurred could not possibly have been prejudicial.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

GRAY et al. v. BRINKERHOFF et al. *

Civ. 19057.

District Court of Appeal, Second District,
Division 3, California.
Nov. 7, 1952.
Rehearing Denied Nov. 24, 1952.
Hearing Granted Jan. 5, 1953.

Action by pedestrian for personal injuries sustained when struck by truck. The Superior Court, Los Angeles County, A. A. Scott, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding that pedestrian had been guilty of contributory negligence.

Affirmed.

1. Automobiles ⇨244(50)

In pedestrian's action for injuries sustained when struck by truck while crossing street, implied finding of jury that plaintiff was contributorily negligent was supported by evidence that plaintiff had watched truck continuously from time she left curb until truck struck her about two feet from center island, and that plaintiff did not increase her speed when truck made left turn and was about fifteen feet from her.

2. Automobiles ⇨245(72)

Whether mistake in judgment by a pedestrian, when crossing a street, as to speed and danger of approaching vehicle constitutes contributory negligence is a question for jury.

3. Negligence ⇨65, 97

The doctrine of contributory negligence, not comparative negligence, is applied in California.

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* Subsequent opinion 258 P.2d 834.

Hirson & Horn and Theodore A. Horn, Los Angeles, for appellants.

Joseph A. Zahradka and Robert Glines, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment for defendants entered on a verdict of a jury in an action for damages for personal injuries.

Plaintiffs are husband and wife. Plaintiff-wife, referred to as plaintiff, was the injured party. The accident occurred at the intersection of Manchester, an east-west street, and Airport, a north-south street, in Los Angeles. Pedestrian and vehicular traffic at the intersection was controlled by red and green lights. There was a north-south marked pedestrian crosswalk on the easterly side of the intersection, and an island in the center of Manchester.

Plaintiff stopped on the curb at the southeast corner of the intersection, awaiting a change of the lights from red to green. Defendant Brinkerhoff, referred to as defendant, driving south on Airport in a pickup truck stopped at the intersection on the red light. When the light changed to green, plaintiff proceeded to walk across Manchester in the crosswalk, and defendant started his truck, gave a signal for a left turn and proceeded to do so. When plaintiff was close to the island, she was struck by the truck.

The first assignment of error is that the evidence is insufficient to support the verdict. We assume, for the purpose of this opinion, that defendant was negligent. When plaintiff was standing on the curb, she observed the truck stopped at the intersection in the lane nearest the center line. She saw the truck start to move when the signal changed as she started across the street, and watched its progress into the intersection. She glanced over her shoulder to look behind her when she was about 10 feet from the curb. The truck was approaching the center of the intersection at that time. When it was in the center of the intersection, it was going about 5 miles an hour. She knew at that time it was going to make a left turn. When the truck was about 15 feet from the crosswalk plaintiff was about 10 feet from the island. She continued walking, and did not increase her speed or try to run at any time. There was nothing to prevent her doing so. When she was a step or two from the island, she was struck by the truck. The truck moved 7 or 8 feet from the point of impact until it stopped. It pushed her some, stopped, and she stepped right up on the island. She had watched the truck continuously from the time she was on the curb until it struck her.

[1, 2] We think it patent that the foregoing evidence supports the implied finding of the jury that plaintiff was contributorily negligent. The jury could well have concluded that plaintiff, in not increasing her speed and stepping onto the island when she knew the truck was coming into the crosswalk at a speed of 8 or 10 miles an hour, did not exercise ordinary care for her own safety. It may well have concluded that plaintiff made a mistake in judgment as to the speed and danger of the approaching truck. Whether a mistake in judgment by a pedestrian, when crossing a street, as to the speed and danger of an approaching vehicle, constitutes contributory negligence is a question for the jury. Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 839, 161 P.2d 673, 164 A.L.R. 1.

[3] Plaintiff says the doctrine of comparative negligence, not of contributory negligence, is the law of this state. The contention is wholly without merit. The cases are legion to the contrary. Further, the cause was tried on the theory that the doctrine of contributory negligence applied, and no suggestion was made in the trial court that the doctrine of comparative negligence was applicable.

The next assignment of error is that the instructions given prejudicially overemphasized the duty of the pedestrian and minimized the duty of the motorist. No purpose would be served in reviewing the several instructions given;[1] it is sufficient to say that we have examined them and find no overemphasis of the duty of the pedestrian, or any minimizing of the duty of the driver. The charge appears to have been fair, and not to have placed undue emphasis on the duties of either party.

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[1] The court gave California Jury Instructions (Civil Nos. 1, 2, 3, 4, 5, 7, 8, 9, 21, 22, 23, 27, 54–B, 101, 101–A, 101–B, 102, 103, 104, 113, 131, 136, 137, 140, 145, 150–C, 201, 201–B, 201–C, 201–E, and instructions on damages.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

114 Cal.App.2d 35

GREENWELL et al. v. CARO et al.

No. 15307.

District Court of Appeal, First District, Division 1, California.

Nov. 3, 1952.

Rehearing Denied Dec. 3, 1952.

Hearing Denied Dec. 29, 1952.

Proceeding to set aside default judgment. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered order vacating default of defendants, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where default of defendants had been taken by reason of excusable neglect of adjuster for insurance carrier representing defendants, there was no abuse of discretion of trial court in setting aside default.

Affirmed.

1. Judgment 🔑143(3)

Where defendants gave copies of summons and complaint to insurance carrier and carrier assigned matter to one of its adjusters, and adjuster through neglect allowed defendants' default to be taken, adjuster was the agent or "legal representative" of defendants within statutory provision that court may relieve party or his legal representative from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect. Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Legal Representative".

2. Judgment 🔑159

Evidence in the form of affidavits is competent upon hearing of a motion to vacate a default judgment. Code Civ.Proc. § 2009.

3. Appeal and Error 🔑1024(4)

In the consideration of an appeal from an order made upon affidavits involving the setting aside of a default judgment, appellate court is bound by the same rule that controls where oral testimony is presented for review. Code Civ.Proc. § 2009.

4. Principal and Agent 🔑21

Even though a witness' extrajudicial statements are not admissible to prove fact of his agency, that fact, when it does not depend upon a writing, may be shown upon the trial by the testimony of the agent himself.

5. Principal and Agent 🔑21

In proceeding to set aside default judgment in action against hotel owners, statements in affidavit of adjuster for hotel owners' insurance carrier, who was taking care of case and allowed default to be taken, were competent to prove that adjuster was agent of hotel owners, and rule that agent may not prove his own agency by extrajudicial statement was not applicable. Code Civ.Proc. § 2009.

6. Judgment 🔑139

An application to set aside default judgment is addressed to the sound discretion of the trial court and it is function of that court to weigh evidence and resolve any conflicts between the affidavits of opposing parties. Code Civ.Proc. § 473.

7. Judgment 🔑159

In proceeding to set aside default judgment, affidavit of adjuster for insurance carrier representing defendant hotel owners, afforded sufficient evidence to support finding of trial court that default had been taken through mistake, inadvertence, surprise, or excusable neglect of insurance adjuster. Code Civ.Proc. § 473.

◆

Myrick, Deering & Scott, San Francisco, for appellant.

Keith, Creede & Sedgwick, Cavan Hardy, San Francisco, for respondent.

FRED B. WOOD, Justice.

This is an appeal from an order vacating the default of defendants Samuel Caro and Jacob Caro and setting aside the default judgment that had been entered against them.

Plaintiff's decedent, Mary Cohn, brought this action for damages sustained as she was leaving a certain hotel, allegedly due to an abrupt step or dropoff from the level of the lobby and doorway to the floor of the entranceway. It appears that defendants Samuel and Jacob Caro own the hotel building, which is operated by a tenant.

Summons and complaint were served upon these defendants August 24, 1951. Their default was entered October 2. Default judgment against them for $29,715 and costs was filed and recorded October 5. November 9 by minute order and November 15, 1951, by written order, the trial court, upon motion of the defendants, set aside the default and the default judgment, permitting their answer (which had been filed October 19 with a notice of motion to vacate and affidavits in support of the motion) to stand as defendants' answer in the case, and ordering that the defendants pay all reasonable expenses of the plaintiff as may be taxed against the defendants.

Plaintiff claims that the trial court acted without evidence, upon the theory that the two affidavits upon which the defendants principally relied (other than the affidavit of merits and the verified answer) were not properly before the court. One of these affidavits, that of defendant Jacob Caro, was mailed to the trial judge after the hearing and submission of the motion to vacate, and plaintiff, by letter to the judge, promptly objected to its consideration and moved it be stricken from the files. There is nothing in the record to indicate whether or not the trial judge considered this affidavit. For the purpose of this appeal, we may assume that he did not consider it, just as if it had not been filed. Its statements were merely cumulative of those which appeared in the other affidavit and in the verified answer.

[1] The other affidavit was that of Joseph I. Taylor, Jr., filed with the notice of motion to vacate, hence timely filed. At the hearing plaintiff objected to its reception in evidence upon the ground that "it is incompetent, irrelevant and immaterial, there is no proper foundation for its receipt, that his statements are hearsay; and on the further ground that there is no showing that Taylor is the agent or legal representative of Samuel and Jacob Caro within the meaning of Section 473 CCP." Section 473 of the Code of Civil Procedure declares that the court may relieve a "party or his legal representative" from a judgment or order or other proceeding taken against him "through his mistake, inadvertence, surprise or excusable neglect." Plaintiff claims that Taylor's neglect or mistake was not that of the defendants nor that of their "legal representative" even if defendants did deliver their copies of the summons and complaint to their insurance carrier for attention, the carrier assigned the matter to one of its adjusters, Taylor, for investigation, and Taylor during his execution of that assignment committed the neglect which resulted in defendants' default. The Supreme Court answered that contention in the negative when in O'Brien v. Leach, 139 Cal. 220, at page 222, 72 P. 1004, at page 1005, it held that the neglect of a party's attorney is that of the party, saying: "That which a person does through his agent is in law, for many purposes, deemed to have been done by himself, and where a party commits his defense to the agency of an attorney, the excusable neglect or inadvertence of the attorney, whereby judgment is taken against the party, is as much available to authorize the court to set aside the judgment, as though the neglect or inadvertence had been that of the party himself." See also Toon v. Pickwick Stages, Inc., 66 Cal.App. 450, 454–455, 226 P. 628; Morgan v. Brothers of Christian Schools, 34 Cal.App.2d 14, 18, 92 P.2d 925; and Hicks v. Sanders, 40 Cal.App.2d 211, 214, 104 P.2d 549. In the Toon case the excusable neglect occurred in the office of the attorney whom the defendant's insurance carrier employed to handle the defendant's case. We see no

difference between his neglect and that of Taylor in the instant case. The mistake or neglect of each was equally the mistake or neglect of the principal, who was a party to the action. We find no holding inconsistent with this view in Salazar v. Steelman, 22 Cal.App.2d 402, 71 P.2d 79, or in Bruskey v. Bruskey, 4 Cal.App.2d 472, 41 P.2d 203, cited by plaintiff upon this point.

[2–5] Plaintiff next contends that even if the mistake or neglect of the agent of a "party" may be deemed that of the party, there is no competent evidence that Taylor was defendants' agent. This contention is based upon the theory that it is not competent for Taylor to prove his own agency by his own extra-judicial statement. This argument is fallacious for two reasons. First, no third person is trying to prove the agency (against the contentions of the principals) by the mere declarations of the agent. The principals are asserting the agency by presenting the affidavit of the agent and thus declaring and adopting what he says concerning the agency. Second, evidence in the form of affidavits was competent upon the hearing of the motion to vacate, Code of Civ.Proc. § 2009; Armstrong v. Armstrong, 81 Cal.App.2d 322, 326–327, 183 P.2d 905. In such a case the same rules apply as where oral testimony is presented. Fuller v. Lindenbaum, 29 Cal.App.2d 227, 230, 84 P.2d 155. Even though a witness' extra-judicial statements may not be admissible to prove the fact of his agency, that fact, when it does not depend upon a writing, may be shown upon the trial by the testimony of the agent himself. Syar v. U. S. Fidelity & Guar. Co., 51 Cal.App.2d 527, 531, 125 P.2d 102. It follows that Taylor's statements, in his affidavit, concerning his agency and that of his company, were competent to prove the agency.

[6] Plaintiff further claims that even if the Taylor affidavit be admissible, the evidence which it affords is insufficient to show excusable neglect; that, instead, it shows inexcusable neglect. In examining the record we must bear in mind that an application for relief, such as this, is addressed to the sound discretion of the trial court and that it is the function of the trial court to weigh the evidence and resolve any conflicts between the affidavits of the opposing parties. City of Pacific Grove v. Hamilton, 100 Cal.App.2d 508 at 509, 224 P.2d 19, and cases cited. We derive from the Taylor affidavit a sufficient basis for the order vacating the default and the default judgment. Taylor in his affidavit states that he is employed as an adjuster by Royal-Liverpool Insurance Group, the insurance carrier for defendants; that on August 27, 1951, the defendants delivered the summons and complaint to the insurance carrier and this was turned over to Taylor for investigation. Taylor immediately telephoned the attorneys for plaintiff and was advised that John Scott was handling the case but Scott was not in. Taylor left his name and telephone number with the operator. Twice during the next two weeks Taylor telephoned John Scott and on September 10, 1951, Taylor for the first time was able to speak to Scott about investigation and settlement of the case. Taylor asked for an extension of time to complete his investigation and John Scott told him, "sure, take your time." Scott wanted to know if Taylor could come to his office and discuss the matter in "a couple of weeks' time." Taylor told him he thought the investigation would be in such a position that he would be ready to discuss the case for settlement. Scott requested Taylor to type a stipulation extending time for 15 days and mail it to him. Taylor said he would do this, and on September 14 mailed a stipulation extending time to September 26, 1951. Thereafter, when the stipulation was returned to Taylor's office for filing, Taylor noticed it was unsigned by Scott and had been returned because of insufficient address. Immediately thereafter and during the first week of October, 1951, Taylor attempted to telephone Scott, but Scott was not in his office. Taylor said he would call again. On October 8, 1951, Taylor wrote to John Scott to ask for additional time and to explain that he had been in contact with the insurance carrier for defendant Milton G. Cone, the tenant of the building where plaintiff's injuries occurred. On October 11, a letter from another member of plaintiff's firm

of attorneys was received advising Taylor that a default was taken October 2, 1951, and denying the request for an extension of time. Taylor stated that on September 26, 1951, and on several other occasions he had discussed with Cyril R. Ash, Jr., an adjuster in the employ of defendant Cone's insurance carrier, the matter of settling this case and was advised that Ash was also in the process of negotiating a settlement with plaintiff;[1] that Taylor in good faith believed the plaintiff's attorneys had granted an extension of time for the purpose of working out the settlement of plaintiff's claim with all of the parties defendant; and that by said mistake, inadvertence, surprise, and excusable neglect the default judgment was taken against Samuel Caro and Jacob Caro.

[7] We conclude that this record furnishes an adequate basis for the order appealed from and that the trial court committed no abuse of discretion in making that order.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

PEOPLE v. ONE 1949 FORD V–8 COUPE, etc., et al. *

Civ. 18698.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1952.

Rehearing Denied Nov. 21, 1952.

Hearing Granted Jan. 5, 1953.

Forfeiture proceeding against an automobile used to transport narcotics, wherein a claim was filed by the assignee of the vendor of the automobile under a conditional sales contract. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered a judgment decreeing forfeiture to the State, and the claimant appealed. The District Court of Appeal, Vallée, J., held that the findings did not support the judgment.

Reversed.

Forfeitures ⇐5

Where it was impossible to determine from findings whether investigation had been made before or after claimant acquired interest in automobile as assignee of conditional vendor and whether purchaser or registered owner of vehicle had been subject of investigation, findings would not support judgment for forfeiture of automobile used to transport marijuana.

McCarroll & McCarroll and Mary A. McCarroll, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Appeal by Beverly Finance Company, the legal owner of an automobile, from a judgment decreeing its forfeiture to the state. Appellant was the assignee of the vendor of the automobile under a conditional sales contract. James Shaffer was the vendee. Mona H. Shaffer was the registered owner. The vehicle was seized while in the custody and control of James Shaffer at a time when he was using it to transport marijuana. A balance of $1,400.12 was unpaid on the contract at the time of seizure.

Section 11620 of the Health and Safety Code provides: "The claimant of any right, title, or interest in the vehicle may prove his * * * conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

The principal question below was whether appellant acquired the interest of the vendor in the contract after a reasonable investigation of the moral responsibility, character, and reputation of the Shaffers. Appellant made an investigation. There was a question as to whether all of the investigation was made before, or whether part of it was made before and part after, appellant acquired its interest. The court made the following finding: "[T]he right, title and interest of said claimant in and to said vehicle was bona fide and was made without any knowledge that said vehicle was being, or was to be, used in violation of the provisions of law relating to narcotics; that before its right, title and interest in and to said vehicle was acquired by said claimant, said claimant did make an investigation of the moral responsibility, character and reputation either of said Mona H. Shaffer or of said James William Shaffer, but that said investigation was not reasonable." Appellant contends the finding is uncertain and unintelligible and does not support the judgment. We agree.

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[1] This advice, while inadmissible to prove that such negotiations were in process, was admissible to show the reasonableness of Taylor's belief that an extension of time had been granted.

* Subsequent opinion 257 P.2d 641.

We had occasion to consider this finding in Beverly Finance Co. v. Superior Court, 112 Cal.App.2d 381, 246 P.2d 142. In that case we said, 112 Cal.App.2d at page, 387, 246 P.2d at page 146: "It does appear that a part of finding V is ambiguous. As above shown, the finding as signed stated in part that the claimant 'did make an investigation of * * * *either* of said Mona H. Shaffer or of said James William Shaffer, but that said investigation was not reasonable.' (Italics added.)"

It is impossible to determine from the finding whether the investigation was made of Mona Shaffer or of James Shaffer. It is impossible to determine, if the investigation was made of Mona Shaffer, whether all of it was made before, or whether part of it was made before and part after, appellant acquired its interest in the vehicle. The same is true with respect to James Shaffer. The importance of a true and complete finding on the subject is self-evident. Appellant claimed below and says here that all of the investigation was made before it acquired its interest, and that it was reasonable. If the trial judge had made a specific, definite finding we could have considered and decided these questions of law. The result is that there is no finding as to whether appellant's interest was created after a reasonable investigation of the moral responsibility, character, and reputation of Mona Shaffer; nor is there a finding on the subject with respect to James Shaffer. The findings do not support the judgment.

Reversed.

SHINN, P. J., and WOOD, J., concur.

114 Cal.App.2d 120

BUCHANAN v. BUCHANAN.

Civ. 19188.

District Court of Appeal, Second District, Division 1, California.
Nov. 10, 1952.

Divorce action brought by a wife against her husband. The Superior Court of Los Angeles County, J. T. B. Warne, J., entered an interlocutory judgment of divorce upon default of defendant and defendant appealed from portion of the decree whereby defendant was ordered to pay plaintiff $15 weekly for plaintiff's support. The District Court of Appeal, White, P. J., held that since complaint did not pray specifically for award to wife of support money the interlocutory judgment of divorce improperly ordered defendant husband to pay support money to plaintiff.

Judgment affirmed as modified.

1. Divorce 🔑160

The rule that relief granted to a plaintiff, if no answer be filed, cannot exceed that which is demanded in complaint, is applicable to default divorce cases. Code Civ.Proc. § 580.

2. Divorce 🔑154

A prayer for general relief in divorce action cannot enlarge power of court to award what is not specifically demanded. Code Civ.Proc. § 580.

3. Divorce 🔑160

Where complaint in wife's divorce action did not pray specifically for award to wife of support money, interlocutory judgment of divorce entered upon husband's default improperly ordered husband to pay support money to wife. Code Civ.Proc. § 580.

Gary Sawtelle, Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

Defendant appeals from that portion of an interlocutory judgment of divorce, entered upon his default, whereby defendant was ordered to pay to the plaintiff wife $15 per week "for her support." The respondent wife has made no appearance in this court by brief or otherwise.

By her complaint the wife alleged that the defendant had been guilty of extreme cruelty; that there were no children of the marriage; that there was no community property. No averments were made as to the need of the wife for support or the husband's ability to pay. The complaint concluded with a prayer that the bonds of matrimony be dissolved; that plaintiff's maiden name be restored; and that "plaintiff be allowed a reasonable sum for attorney's fees and for her costs herein; for such other and further relief as to the court may seem just and proper."

[1-3] Appellant's contention that in the circumstances presented the trial court erred in making an award of support money is well taken. The rule that the relief granted to a plaintiff, if no answer be filed, cannot exceed that which is demanded in the complaint, Code Civ.Proc. § 580, is applicable to default divorce cases, Bennett v. Bennett, 50 Cal.App. 48, 194 P. 503; Eddy v. Eddy, 64 Cal.App.2d 672, 149 P.2d 187; Peck v. Peck, 52 Cal.App.2d 792, 127 P.2d 94; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64; Majors v. Majors, 70 Cal.App.2d 619, 161 P.2d 494; Blackwell v. Blackwell, 86 Cal.App.2d 513, 194 P.2d 796. A prayer for general relief cannot enlarge the power of the court to award what is not specifically demanded, Eddy v. Eddy, supra, 64 Cal.App.2d at page 673, 149 P.2d 187. As above stated, the complaint herein contains no prayer for support and no allegations as to the need therefor or the ability of the defendant to pay.

The judgment is modified by striking therefrom the words, "That defendant be required and he is hereby ordered to pay to plaintiff $15.00 per week for her support to commence forthwith." As so modified, the judgment is affirmed. Appellant to recover costs on appeal.

DORAN and DRAPEAU, JJ., concur.

114 Cal.App.2d 82

In re Guardianship of WALSH.

Civ. 19048.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1952.

Hearing Denied Jan. 5, 1953.

Petition for removal of guardian. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that the alleged facts that the ward's father had named petitioner as guardian in his will and that petitioner would rear the ward in the religious faith of his father, whereas the present guardian would not, were insufficient for removal of the guardian.

Affirmed.

1. Guardian and Ward 🔑25

Statutory provisions which are governing in matter of appointment of guardians with respect to preference between persons equally entitled to be guardian in other respects are not applicable to proceeding for removal of a guardian. Probate Code, § 1580.

2. Guardian and Ward ⚿25

Fact that one had preferred right to be appointed guardian is not cause for removal of another who has been duly appointed, and guardian may not be removed for a cause other than those stated in the applicable statute. Probate Code, § 1580.

3. Guardian and Ward ⚿25

In proceeding for removal of guardian, finding of trial court that it was in best interests of ward that he remain under the guardianship negatived existence of any of causes for removal of guardianship specified in applicable statute. Probate Code, § 1580.

4. Guardian and Ward ⚿25

Where maternal grandmother had been appointed guardian, alleged facts that ward's father in will had named ward's paternal grandmother as guardian, and that paternal grandmother would rear ward in same religious faith as father, whereas maternal grandmother would not, were insufficient to warrant removal of maternal grandmother as guardian. Probate Code, § 1580.

5. Guardian and Ward ⚿29

Court did not abuse its discretion in terminating paternal grandmother's right to have grandson with her each Saturday and Sunday and restricting such grandmother's only visits with grandson to home of maternal grandmother, the appointed guardian.

◆

Joseph Scott, J. Howard Ziemann, Los Angeles, and John R. Kent, Long Beach, for appellant, Bertha I. Walsh.

Reynolds, Painter & Cherniss, Los Angeles, for respondent, Edith Jaeger.

SHINN, Presiding Justice.

Bertha I. Walsh appeals from an order denying her petition to remove Edith Jaeger as guardian of the person and estate of Michael James Walsh, a minor six years of age, and for the appointment of herself as guardian, which order also granted the petition of Edith Jaeger for modification of an order respecting the custody of said minor. The order, before modification, allowed Mrs. Walsh to have the custody of the minor each Saturday and Sunday, and as modified gives her only the right to visit the child at reasonable times and upon reasonable notice in the home of Mrs. Jaeger.

A former appeal by Mrs. Walsh, paternal grandmother, from the order appointing Mrs. Jaeger, maternal grandmother, guardian, was before us two years ago. The decision on that appeal affirming the order is reported in 100 Cal.App.2d 194, 223 P.2d 322, 22 A.L.R.2d 689. However, at the time Mrs. Jaeger was appointed the court had not admitted to probate the will of Michael's father, in which he appointed his mother, Mrs. Walsh, guardian of the minor. The duly probated will was before the court in the instant proceeding and the principal question now presented is whether upon the facts found at the hearing the court was required to remove Mrs. Jaeger and appoint Mrs. Walsh.

In the petition of Mrs. Walsh it was alleged that Michael's father appointed her by his will as guardian of Michael and another child; that the father was of the Catholic faith; that Mrs. Jaeger would not rear Michael in that faith, and that she, Mrs. Walsh, would do so. These were the facts principally relied upon for the removal of Mrs. Jaeger. It was also alleged that Mrs. Jaeger discouraged Michael from visiting Mrs. Walsh.

It appears to be the theory of appellant that as an appointee by will she would have had a better right originally to be appointed guardian by the court than would Mrs. Jaeger, even though the court had found that it was for the best interests of Michael that he should be under the guardianship of Mrs. Jaeger, and from this premise appellant argues that she, Mrs. Walsh, had a right to have Mrs. Jaeger removed and herself appointed.

[1] The statutory provisions with respect to preference between persons equally entitled in other respects, which are governing in the matter of the appointment of guardians, are not applicable to a proceeding for the removal of a guardian. The question is not presented and we inti-

mate nothing as to whether one appointed by will, or another applicant whose appointment is found by the court to be for the best interests of the minor, has the better right to guardianship.

[2] The causes for removal of a guardian are stated in § 1580 of the Probate Code.[1] The fact that one had a preferred right to be appointed is not a cause for removal of another who has been duly appointed. A guardian may not be removed for a cause other than those stated in § 1580. In re Guardianship of Sturges, 30 Cal.App.2d 477, 86 P.2d 905; In re Raynor, 74 Cal. 421, 425, 16 P. 229; In re Estate of Atkins, 121 Cal.App. 251, 8 P.2d 1052; In re Guardianship of Kimball, 80 Cal.App.2d 884, 182 P.2d 612; In re Guardianship of Sherman, 42 Cal.App.2d 251, 108 P.2d 717; In re Kandarian, 187 Cal. 479, 202 P. 647; Sakurai v. Superior Court, 65 Cal.App. 280, 223 P. 575; 39 C.J.S., Guardian and Ward, § 45, page 65.

[3, 4] The facts alleged in the petition were legally insufficient to state a cause for the removal of Mrs. Jaeger. The court found that Mrs. Jaeger has properly discharged her duties as guardian and that it is to the best interests of Michael that he remain under her guardianship. This finding was made upon conflicting evidence and is conclusive as to the facts found. The clear effect of the finding is to negative the existence of any of the causes for removal of a guardian specified in § 1580. Hence, the court would have been unjustified in removing Mrs. Jaeger as guardian.

We have not overlooked the contention of appellant which is stated as follows: "The court's refusal to appoint appellant as guardian is a violation and a denial of the religious freedom, due process and equal protection of law guarantees of the United States and California Constitutions." It is sufficient upon this point to repeat that the procedure for the removal of a guardian is purely statutory, and to add that it is clearly within the power of the legislature to make laws governing the appointment and removal of guardians. There are numerous considerations which should influence the court in the appointment of guardians that are foreign to a removal proceeding.

[5] There remains appellant's final contention that it was an abuse of discretion for the court to terminate appellant's right to have Michael with her each Saturday and Sunday, and to permit only visits with him at the home of Mrs. Jaeger.

With reference to the petition for modification, the court found the following facts: "(4) Since the Order appointing *your petitioner* guardian of the person of Michael James Walsh, a minor, was made, the conditions and circumstances surrounding the parties and the minor and upon which said Order was based, have materially changed, in this: (a) On many occasions after the minor, Michael James Walsh, returned from the weekend custody, which the respondent Bertha I. Walsh has had, said minor by the acts, conduct and statements of said respondent Bertha I. Walsh was made emotionally upset, nervous, confused, insecure, restless and disobedient, which conditions were removable only through special effort, reassurances, care, love and affection given to said minor by petitioner Edith Jaeger; (b) That much dissension exists between the grandparents concerning the care and welfare of said minor, which is detrimental to the best interests of said minor and which has led to confusion and a feeling of insecurity in the mind of the minor. Such dissension arises in part from differences in religious philosophies and beliefs maintained by petitioner and respondent. The present arrangement, contained in the Order appointing Guardian herein, providing for the minor's spending part of the time in the home of the Jaegers and part of the time in the home of the Walshes, is not for the best interests of the child, but it is for the best interest of the child that he remain at all times in the home of the Jaegers." It was further found that while the child was with Mrs. Walsh he was instructed in the Catholic faith, and while with Mrs. Jaeger, in the Lutheran faith; that Mrs. Jaeger is a fit and proper person to be guardian and has performed her duties as such in a proper manner; that Mrs. Walsh is not a proper person to be appointed guardian "by reason of the findings herein made;" that Mrs. Jaeger has not discouraged Michael from visiting Mrs. Walsh; and "it is for the best interests of said minor with respect to his temporal, moral and mental welfare that Edith Jaeger remain as his guardian." The finding that Mrs. Walsh is not a proper person to be appointed guardian is merely a conclusion from the other facts found. It is not material as a finding or as a conclusion, inasmuch as the determinative issue was whether Mrs. Jaeger should be removed and not whether Mrs. Walsh should be appointed in case she were removed.

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[1] "§ 1580. Causes for removal of guardian. A guardian appointed by will or deed or by the court may be removed by the court for any of the following causes: (1) For waste or mismanagement of the estate, or abuse of his trust; (2) For failure to file an inventory or to render an account within the time allowed by law, or for continued failure to perform his duties; (3) For incapacity to perform his duties suitably; (4) For gross immorality; (5) For having an interest adverse to the faithful performance of his duties; (6) For removal from the state; (7) In the case of a guardian of the property, for insolvency; or, (8) When it is no longer necessary that the ward should be under guardianship."

We think a sufficient answer to the criticism of the modifying order is to be found in the testimony of Mrs. Walsh. With commendable candor and good judgment she testified as follows, in answer to questions by the court: "Q. Do you feel it is for the best interests of the child that he be in one home the entire period rather than being divided between the two homes? The Witness: I certainly think it is better, Judge, and I think everybody knows that to take a child and move his bed and move his food and have this dissension going on, it cannot go on this way. The court: In other words, being divided, part in one and part in another, is detrimental to the best interests of the child? The witness: I know it is. To have a child so—having this bickering, and things, going on between the—the unfriendliness, the attitude like that—I know that isn't the right way to bring up a child. I have brought up four children myself."

The trial judge was impressed by this testimony of Mrs. Walsh and after quoting the same in a memorandum decision stated that the minor had expressed the desire to live in the home of the Jaegers, and that it was clear to the court that the present arrangement under which the minor was spending part of the time in the home of the Jaegers and part of the time in the home of Mrs. Walsh was not for the best interests of the child.

Since no legal cause was established for the removal of Mrs. Jaeger and the appointment of Mrs. Walsh, the modification was, without doubt, a proper one.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

114 Cal.App.2d 40

EPLEY et al. v. INGERSOLL et al.

Civ. 8162.

District Court of Appeal, Third District, California.

Nov. 5, 1952.

Action on note given in payment for timber purchased from plaintiff's assignors by defendant makers. The purchasing agreement provided that adjustments would be made if there was more than 5% loss due to overripe trees. The Superior Court, Yuba County, Arthur Coats, J., entered judgment for plaintiff and denied defendants' motion for new trial, and defendants appealed. The District Court of Appeal, Schottky, J., pro tem., held that evidence was sufficient to sustain judgment.

Judgment affirmed and appeal dismissed.

1. Appeal and Error 🔑931(1), 1010(1)

Issues of fact must be determined by the trial court, and before an appellate tribunal can be justified in reversing judgment on ground of insufficiency of evidence, it must appear from the record that, accepting full force of evidence together with every reasonable inference favorable to prevailing party and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment.

2. Logs and Logging 🔑3(15)

In action on note given in payment for timber purchased from plaintiff's assignors by defendant maker, where purchase agreement provided that an adjustment would be made if there was more than 5% loss due to overripe trees, evidence was sufficient to sustain judgment for plaintiff.

3. Bills and Notes 🔑534

In action on promissory note, which provided for collection of attorney's fees in event of suit on the note, where amount recovered on note was $2,440, award of $450 attorney's fees was not excessive.

◆

Rich, Carlin & Fuidge, Marysville, for appellant.

Francis M. Arnoldy (of Heenan & Arnoldy), Marysville, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff commenced an action against defendants upon a promissory note executed by defendants in favor of plaintiff's assignor. Defendants Elmer Ray Ingersoll and Emma Ingersoll, his wife, were copartners doing business under the firm name and style of Ingersoll Lumber Company. On May 10, 1949, at Marysville, California, defendants gave plaintiff's assignors, Arthur D. Mervin and Rebecca Mervin, his wife, a promissory note for $6,000, payable in $1,000 monthly installments commencing July 1, 1949, with a certain grace period allowed for payment of the last two installments. The note was given in consideration for and in connection with an agreement between defendants and plaintiff's assignors, the Mervins, also dated May 10, 1949, which superseded a previous agreement between the parties, under which agreement of May 10, 1949 defendants agreed to purchase all the merchantable timber of specified size and variety located on a certain 480 acres of real property owned by the Mervins and situated in Yuba County, California. The agreement contained the proviso:

> "Should it develop during the overall operations that there is more than five per cent of loss due to overripe trees there shall be an adjustment made at that time between the parties hereto. In case the parties cannot agree upon a reasonable adjustment to be made in case one should have to be made as provided herein, then they shall submit the matter to arbitration. Each party shall select one person and the two so selected shall name a third disinterested person, and the decision of the majority shall be binding upon the parties hereto."

The complaint alleged that only $2,960 had been paid on the note and sought judgment for the balance of $3,040, interest, and the sum of $450 attorney's fees. Defendants in their answer set up a separate defense in which they alleged that the percentage of overripe and unmerchantable trees was more than fifty per cent; that they had sought an adjustment which had been refused by plaintiff; that the consideration for said note had therefore failed to the extent of $3,040, the balance due on the said note; and that plaintiff was not entitled to recover thereon.

The case was tried by the court sitting without a jury. The principal and in fact the only issue at the trial was the amount of timber which was unmerchantable because overripe or rotten. Expert testimony and other testimony was presented by both parties, and the evidence was highly conflicting. The trial court found that defendants were entitled to an allowance of $600 for overripe timber over and above the 5% tollerance allowed by the contract. This reduced the unpaid balance on the note from $3,040 to $2,440, for which plaintiff recovered judgment, together with $450 attorney's fees. Defendants' motion for a new trial was denied and they have appealed from the judgment and from the order denying their motion for a new trial.

Appellants make a vigorous attack upon the sufficiency of the evidence to support the judgment. They make an extensive listing of the results of the cruise of standing trees and fallen logs which their expert had made, and which showed a 58.6 percentage of sound logs and trees, and a 41.4 percentage of overripe trees and logs. From this, appellants argue that they should be "relieved from further payments under the note because of the failure of consideration for which the note was executed [large percentage of overripe trees and logs existent at date of execution of contract constituting the failure], it being a well recognized fact that such a large percentage of unmerchantable timber on any property is not profitable to cut and plaintiff's assignor in all fairness should not be permitted to further profit from such a contract." However, appellants suggest that if adjustment is to be made as provided in the contract, then their percentage figures would show a balance remaining due and unpaid of only $556. Appellants dismiss the testimony of respondent's expert timber cruiser as being too vague because he used a sample area, he could not state the precise section wherein he took his sampling, his cruise was based upon a stumpage examination which may have included stumps smaller than the prescribed 20 inches and may have included stumps from logging operations previous to this one. Appellants argue that the cruise made by their timber expert was a more complete and representative survey because it covered a greater area and covered standing and fallen timber, instead of just the stumps of what had already been cut.

Respondent in reply points out that appellants have removed all of the merchantable timber from the property in question, and that respondent's expert testified to finding a loss factor of only 2.46% and that the percentage of unmerchantable timber was well within the 5% tolerance allowed by the contract. Respondent also goes into some of the background of previous dealings between the Mervins and appellants which resulted in the agreement of May 10, 1949, but that would not appear to be here relevant. Respondents also devote considerable discussion to disproving the mathematics employed by appellants' expert. As for the assertion that respondent's expert did not know the precise section of land wherein he took his sampling, respondent quotes the trial court's comment as establishing that the sampling was done on the correct property: "They pointed out the area and the witness on the stand made a misdescription. The fact that you asked him about 11 and 12 isn't going to affect the situation. As I understand it, they identified the property in question in each instance as the property in dispute here. These witnesses said that they didn't even know the name of the section, in response to your questions. He did say 11 and 12, nevertheless in the beginning he said he didn't even know which section it was or township or range. All he knew was that it was this Mervin property."

[1] Appellant's argument upon the question of the sufficiency of the evidence is but an argument as to the weight of conflicting evidence. Issues of fact must be determined by the trial court and an appellate tribunal is bound by the familiar rule that before it can be justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that accepting the full force of the evidence, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment.

[2] Applying this rule to the instant case it is clear that the record amply supports the judgment. If the judgment had been in favor of appellants their argument would be very helpful in pointing out evidence supporting such a judgment, but in view of the adverse judgment the testimony pointed out and relied upon by appellants merely accentuates the conflict in the testimony, which conflict it was the function of the trial court to resolve. The trial court, first in its findings and judgment, and again in denying appellants' motion for a new trial, resolved this conflict against appellants, and this finding,

based as it is upon conflicting evidence, is binding upon us.

[3] Appellants in their typed argument, filed after the oral argument, for the first time argue that the sum of $450 allowed by the court as attorney's fees is excessive. There is no merit in this contention. The promissory note provided for attorney's fees in the event of a suit upon the note, and there is nothing in the record to indicate that the amount allowed by the trial court was excessive.

In view of the foregoing the judgment is affirmed and the appeal from the order denying the motion for a new trial is dismissed.

PEEK and VAN DYKE, JJ., concur.

114 Cal.App.2d 108

CHIYOKO IKUTA v. SHUNJI K. IKUTA et al.

Civ. 18621.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1952.

A wife brought an action against her husband for divorce and she appealed from portions of interlocutory judgment of divorce and the husband appealed from portions of an order of the Superior Court of Los Angeles County, Ben Rosenthal, J., ordering payment of costs and attorneys fees for prosecution of appeal from interlocutory judgment of divorce. The District Court of Appeal, Drapeau, J., held that questions raised by husband's appeal were moot.

Appeal dismissed.

Divorce 🔑184(1)

Where wife appealed from portion of interlocutory divorce judgment awarded her and defendant husband appealed from portions of order which directed him to pay during pendency of appeal a specified amount of money for support of children of parties, and to pay costs and counsel fees for prosecution of appeal, with money ordered paid for costs and counsel fees to be withdrawn from a joint account of parties on deposit in a bank, which money was to be charged against plaintiff if divorce judgment was affirmed and against defendant if plaintiff prevailed in her appeal, and wife's appeal was dismissed, questions raised by defendant's appeal were moot.

Dr. Shunji K. Ikuta, pro per.

No appearance for respondent.

DRAPEAU, Justice.

On December 7, 1948, plaintiff filed her second action for divorce subsequent to an agreement for reconciliation and division of the community property. The interlocutory judgment in that action was filed December 14, 1950. Plaintiff was awarded a divorce on the ground of extreme cruelty; custody of the three minor children; $200 per month for their support. The property agreement was approved; the joint tenancy and separate property of both parties was listed, and the community property was divided equally between them.

On January 22, 1951, plaintiff wife appealed from portions of said judgment.

Thereafter upon hearing of an order to show cause which issued therein, the court on February 23, 1951, ordered defendant husband to pay during the pendency of the appeal, $200 per month for support of the children. Also, $1,000 for costs and $3,000 counsel fees for prosecution of the appeal, the $4,000 to be withdrawn from the joint account of the parties on deposit in a bank in Honolulu.

The court further ordered "that in the event of the affirmance of the said Judgment from which the appeal is taken, the said $4,000.00 shall be charged against the plaintiff, Chiyoko Ikuta, and in the event that the said plaintiff prevails in the said appeal, the said sum of $4,000.00 shall be charged against the defendant, Dr. Shunji K. Ikuta."

On March 7, 1951, defendant filed notice of the instant appeal from those portions of the order of February 23, 1951, which have reference to payment of costs and attorneys' fees pending appeal from the judgment of divorce.

In the meanwhile, to-wit, on October 11, 1951, the appeal from the interlocutory judgment of divorce was dismissed by this court pursuant to the request of Chiyoko Ikuta, the appellant in that action.

As a result, costs and attorneys' fees are chargeable to Chiyoko Ikuta, respondent herein, and the questions raised by this appeal have become moot. This for the reason that they no longer present an existing controversy for decision by this court. See Wilson v. Los Angeles County, etc., Comm., 112 Cal.App.2d 450, 246 P.2d 688.

For the reasons stated, the instant appeal is dismissed.

WHITE, P. J., and DORAN, JJ., concur.

114 Cal.App.2d 91

HOWARD et al. v. GENERAL PETROLEUM CORP. et al.

Civ. 19134.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1952.

Rehearing Denied Nov. 24, 1952.

Hearing Denied Jan. 5, 1953.

Action to recover royalties on production of oil well sold to defendant lessee because of lessee's alleged fraudulent representation that well was not producing in paying quantities and that lessee intended to abandon it. The Superior Court of Los Angeles County, F. Ray Bennett, J., rendered judgment for lessee and others, and lessors appealed. The District Court of Appeal, Vallée, J., held that evidence failed to establish that lessee intended to defraud lessors, that it did not honestly believe representations claimed to have been made, or that such representations were in fact false.

Affirmed.

1. Mines and Minerals 🔑59

Execution and delivery of grant deed from lessors to lessee and of instrument stating that, in consideration of $1,000 and lessee's assumption of lessors' obligation to pay back taxes and assessments, lessors released lessee from all claims for damages occasioned by lessee's operation under lease and acknowledged that lessee had fully performed every obligation to be performed under lease by lessors were sufficient to convey all lessor's interest in lease to lessee unless the instruments were procured by fraud.

2. Mines and Minerals 🔑79(7)

In action to recover royalties on production of oil well sold to defendant lessee because of alleged fraudulent representations of defendant that well was not producing in paying quantities and that defendant intended to abandon it, evidence did not establish that defendant intended to defraud plaintiff lessors, that it did not honestly believe the representations claimed to have been made, or that such representations were in fact false.

3. Mines and Minerals 🔑73

The right of a lessor under a community lease lasts only during continuance of the lease.

4. Appeal and Error 🔑843(2)

In action to recover royalties, where findings that deed and release from lessors to lessee were executed and not procured by fraud were sufficient to support judgment for lessee, it would not be necessary to consider other points made by plaintiff lessors as to defendant lessee.

John N. Metcalf and Elon G. Galusha, Los Angeles, for appellants.

D. W. Woods, J. M. Jessen and Martin J. Weil, Los Angeles, for respondent General Petroleum Corp.

Cree & Brooks, and John W. Brooks, Long Beach, for respondents Jack Herley, and others.

VALLÉE, Justice.

This case was here before. Howard v. General Petroleum Corp., 108 Cal.App.2d 25, 238 P.2d 145. On the former appeal, it appeared that after all evidence of the parties was in, the court had rendered a judgment of nonsuit instead of making findings of fact. We reversed the judgment of nonsuit with directions to the trial court to make findings and conclusions of law, and to render judgment thereon. Thereafter, the trial court made findings and conclusions of law, and rendered judgment for defendants. Plaintiffs appeal from that judgment.

The facts are stated in our former opinion, and need not be repeated except to skeletonize them for the purpose of understanding the assignments of error.

Prior to 1926, plaintiffs, the owners of lot 18, block 19 of Athens, in Los Angeles, together with the owners of adjoining lot 19, were lessors in a community oil and gas lease. Royalty was to be paid to the lessors at the rate of one eighth of production, one half to the owners of lot 18, and one half to the owners of lot 19, whether production be from one lot or the other. A well had been drilled on lot 19. On March 27, 1926, the lessees assigned the lease to defendant General Petroleum Corporation, which operated the well and paid royalties until December 1, 1932. On October 26, 1932, General Petroleum bought lot 19. On December 1, 1932, General Petroleum received from plaintiffs a deed to lot 18 and a release of all its obligations under the lease, paying therefor $1,000 and other consideration. Plaintiffs have retained the consideration and have not rescinded, or attempted to rescind, the transaction. On January 11, 1933, General Petroleum conveyed lots 18 and 19 and the well on lot 19, and transferred all equipment and personal property owned by it and located on the lot, to R. P. Cooney. On January 23, Mr. Cooney entered into an oil and gas lease of lot 19 with defendants Jack Herley and Paul L. Kelley who reconditioned the well and have operated it since that time, paying royalties to the lessor but none to plaintiffs. This action is to recover damages in the amount of royalties on the production from the well on lot 19 since December 1, 1932.

[1] The court found that by a grant deed dated December 1, 1932, plaintiffs conveyed lot 18 to General Petroleum, and concurrently therewith released it from the performance of all obligations under the lease. Plaintiffs contend this finding is without support in the evidence. The contention is without merit. Plaintiffs executed a grant deed, dated December 1, 1932, acknowledged January 4, 1933, of lot 18 to General Petroleum, and an instrument also dated December 1, 1932, and acknowledged January 1, 1933, which reads that in consideration of $1,000 and the assumption by General Petroleum of their obligation to pay back taxes and assessments in the amount of $1286.-19 "we hereby release General Petroleum Corporation * * * from any and all claims for damage occasioned by virtue of their operation under" the lease, and "acknowledge that said General Petroleum Corporation * * * has fully performed each and every obligation to be performed thereunder by lessee."

These instruments were sufficient to convey all of plaintiffs' interest in the lease to General Petroleum unless they were procured by fraud. The complaint alleged that General Petroleum represented to plaintiffs that the well was not producing oil or gas in paying quantities, and that it was the intention of General Petroleum to abandon the same; that plaintiffs believed the representations, and in reliance thereon sold lot 18 to General Petroleum; that the representations were false and made with a fraudulent intent. The court found that none of the plaintiffs was induced to sell lot 18 to General Petroleum or to execute the deed or the release as a result of any false or fraudulent representation made to any of them by General Petroleum. The court also found that at the time they were executed, General Petroleum intended to abandon the oil well situated on the lands conveyed by the lease, either itself or through some third party, and that the allegations of fraud are not true. The court further found that General Petroleum produced no oil from the well on lot 19 after December 1, 1932, and had no knowledge or notice that the well was not abandoned, or that it was operated thereafter for the production of oil and gas. These findings are supported by substantial evidence.

In the fall of 1932, General Petroleum was operating eighteen wells in the Athens field. The price of oil was low. All of the wells were "wet," in bad condition, and could not be operated at a profit. General Petroleum decided to discontinue all operations in the Athens field, and to abandon all of the wells. When its production department advised Mr. Needham, head of its land department, of its intention to abandon the wells, Mr. Needham determined that General Petroleum could save money if it bought the fee title to lots 18 and 19 for a price less than the cost of plugging and abandoning the well on lot 19 and removing the concrete and otherwise cleaning the surface of the ground, and sell the well. It abandoned all but four of the 18 wells. On October 26, 1932, it purchased lot 19 for $1,200 cash and payment of $881.12 in delinquent taxes and assessments. Plaintiffs were then in Michigan. There was a delinquency of $1,286.19 in unpaid taxes and assessments, liens on lot 18. A suit was pending to foreclose a street bond, a lien on the property.

On December 12, 1932, General Petroleum sent a letter to plaintiffs in which it said: "If you desire to relieve yourself of any obligations to pay these back taxes we will assume this obligation and pay to you the sum of $1,000.00 in return for a deed to us to the property and release of the obligations of the lessee under the terms and conditions of the lease." On December 16 plaintiffs replied, accepting the offer "for the property and lease." The deed and release were then sent to plaintiffs and executed. By the end of 1932, General Petroleum had discontinued operation of all wells it had had in the Athens field. It sold lot 19 and three other wells to R. P. Cooney. Cooney, at the time, was in the business of salvaging oil wells and selling used oil well equipment.

The testimony of plaintiff Grace C. Howard by deposition was to the effect that she had received letters from General Petroleum other than the one of December 12, 1932, containing the offer; that the letters were lost or destroyed; that one stated "that the field was no longer profitable to operate and that therefore the field was being abandoned and would we accept * * * I think there was another letter, * * * but that is rather hazy * * * but would we accept $1,000 in lieu of the back taxes that were accumulating" and "that the price of the oil was so low that it was no longer profitable to operate the field, that stands out quite clear in my mind * * *." She could not remember having signed any instrument other than the deed. She testified it was "so long ago that it is very hazy." She also testified that the letter of December 12, 1932, was the letter she received.

Plaintiff Margaret C. Savery, who was in school in 1932, testified by deposition that one letter from General Petroleum stated "that the price for oil per barrel was so low that it was no longer paying to keep the well going, something to that effect, or that they were planning to abandon the field because of the low price for oil" and that "the price per barrel of oil was so low that it was no longer profitable to operate the field and the impression that I remember from that letter as [was] the Athens production field was to be abandoned."

[2, 3] Plaintiffs' attempted proof of fraud was weak and unsatisfactory. The trial judge was fully justified in concluding that the evidence was not clear and convincing. There was no evidence that General Petroleum intended to defraud plaintiffs, or that it did not honestly believe the representations claimed to have been made, or that they were in fact false. The grant deed and release terminated plaintiffs' right to royalties. The right of a lessor under a community lease lasts only during continuance of the lease. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 136–140, 114 P.2d 351, 135 A.L.R. 546.

[4] Since the findings that the deed and release were executed and were not procured by fraud are sufficient to support the judgment, it is not necessary to consider other points made by plaintiffs as to General Petroleum.

Plaintiffs' interest in the lease having been terminated by the execution of the deed and the release, there is no basis on any theory for a judgment against the other defendants.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

114 Cal.App.2d 61

PEOPLE v. FRAHM et al

Civ. 4427.

District Court of Appeal, Fourth District, California.

Nov. 6, 1952.

The state brought an action in eminent domain against lessor of realty, on which lessee had constructed a drive-in restaurant, against lessee, and against sublessee to condemn the realty, the parties stipulated that total value of realty, lease, and sublease was $35,000. The Superior Court of Riverside County, John G. Gabbert, J., entered judgment apportioning the award, and the lessee appealed from portion of judgment in favor of sublessee. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that sublessee's interest was $6,000.

Judgment affirmed.

1. Evidence 🔑474(18)

In eminent domain proceeding by the state against lessor of realty, on which lessee had constructed a drive-in restaurant, against lessee, and against sublessee, sublessee was entitled to testify as to market value of his interest.

2. Evidence 🔑543(3)

In eminent domain proceeding by the state against lessor of realty, on which lessee had constructed a drive-in restaurant, against lessee, and against sublessee, public accountant who had many years experience in the restaurant business, and who kept books of sublessee, was properly permitted to testify as an expert witness as to value of sublessee's interest.

3. Eminent Domain 🔑202(7)

In eminent domain proceeding by the state against lessor of realty, on which lessee had constructed a drive-in restaurant, against lessee, and against sublessee, evidence concerning experience of sublessee in running the business and general conditions surrounding that operation, was admissible as to market value of sublessee.

4. Eminent Domain 🔑205

In eminent domain proceeding by the state against lessor of realty, on which lessee had constructed a drive-in restaurant, against lessee, and against sublessee, evidence sustained finding that value of sublease was $6,000 out of the $35,000 which parties stipulated was total value of realty, lease, and sublease.

Coudures & Carter, Perris, for appellant.

Wing, Wing & Brown, Banning, for respondents.

BARNARD, Presiding Justice.

The state brought this action in eminent domain to condemn some 22 parcels of property required in connection with certain highway construction. Parcel 22 was owned by Carl E. Mellor. On August 30, 1945, Mellor had leased the property to Archibek for 10 years, with an option for an additional 10 years. Archibek erected a drive-in restaurant on the property, and on January 17, 1947, subleased it to David and Rose Meyer for a term of five years at a rental of 10% of the weekly gross sales, with a minimum of $50 per week. The Meyers operated the drive-in restaurant until the state took possession of the property on October 6, 1949.

The case, as to Parcel 22, was separately tried before a jury. After several days of trial it was stipulated that the total value of Parcel 22 was $35,000, and the state was permitted to withdraw from further participation in the trial. The defendants Mellor, Archibek, and Mr. and Mrs. Meyer continued a second phase of the trial to determine the value of their separate interests as related to the stipulated total value. The jury found the value of Mellor's interest to be $17,650; the value of Archibek's interest to be $11,350; and the value of the Meyer interest to be $6,000. A judgment was entered accordingly, and Archibek has appealed from the part of the judgment in favor of the Meyers.

The appellant first contends that the verdict in favor of the Meyers is not supported by sufficient evidence, is contrary to the evidence, and is contrary to the law. It is argued that the two witnesses for the respondents, David Meyer and Mr. Difani, were not qualified as experts on the valuation of a leasehold interest; that being incompetent to testify as experts their testimony should have been stricken *in toto*; that their testimony as to valuation was based largely upon the element of profit and other irrelevant and incompetent matters; that the opinion of David Meyers as to the market value of the sublease, being based largely upon the elements of profit and of his operation of the drive-in, was incompetent in that it related to the value of the leasehold to him but had no relation to its market value; and that an analysis of the entire evidence discloses that the respondents' sublease had no market value.

No objection was or is made to the jury's award of $17,650 to Mellor, the owner. That valuation was placed on the owner's interest by an expert witness, who was the first witness on this phase of the controversy and the only witness called by the appellant. This witness expressed the opinion that "the value" of Archibek's leasehold interest was $17,350, and that "the lease held by Mr. Meyer has no market value, and is not saleable on the open market." He testified that he arrived at this opinion by two methods: (1) by taking the owner's interest as fixed ($17,650) and considering the remainder as the value of the lessee's interest, the sublessee's interest being worth nothing; (2) by taking what a prudent buyer would pay for the Archibek lease, if it was for sale, and figuring a net return of 10% on the invested capital, which "showed me that the property was worth, at the time of taking $17,350." No adequate reason was given for the opinion expressed that the Meyer lease, for the remainder of the term, was valueless.

Mr. Meyer testified that the market value of his sublease was $8,637.38; that it had a market value of 20% of the gross receipts whereas he was paying 10% as rental; and that at the time the property was taken by the state he could have sold his lease for $8,637.38. Mr. Difani, who was a public accountant with many years' experience in the restaurant business, and who kept the respondents' books, testified that the business being done would justify the payment of a 20% gross rental.

The appellant's contention is that respondents' witnesses were not sufficiently qualified as experts on the market value of leasehold interests; that the testimony of these witnesses with respect to the costs of operation, rent paid, and other factors showing the situation existing up to the time the state took possession, was not admissible; and that no admissible evidence remains which would support a finding that this sublease had any value whatever.

[1, 2] Not only was the witness Meyer qualified as an expert, having had many years' experience in this kind of work, but as an owner he was entitled to testify as to the market value of his property. He gave such testimony, and his reasons therefor appear more plausible than those which appellant's expert gave for his reasons. The testimony to which the appellant objects, regarding the facts in connection with the actual operation of this business, was properly admitted as being a part of the foundation for the opinion expressed as to the value of the lease. Mr. Difani was also qualified as an expert witness and his testimony, while it may not have been sufficient in itself to support the verdict, was properly admitted and furnished considerable support to Meyer's testimony.

[3, 4] There was some evidence of the market value of this sublease, the amount being greater than that allowed by the jury. The actual experience of the respondents in running this business, and the general conditions surrounding that operation,

would greatly affect the saleability of that lease, and had an important bearing on its market value. Even the value of the appellant's lease would largely depend on many of those factors. Not only was this evidence admissible, but it disclosed that this sublease had a very substantial value. The evidence as a whole sufficiently supported the award made.

Under the views already expressed, it is unnecessary to consider the further contention that the court erred in admitting the evidence with respect to the operation of this restaurant and the surrounding conditions, and that the court abused its discretion in denying appellant's motion for a new trial which was based upon the same matters.

The judgment is affirmed.

GRIFFIN, J., concurs.

114 Cal.App.2d 133

PEOPLE v. EBERHARD.

Cr. 2831.

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1952.

Defendant was convicted in Superior Court of the State of California, in and for the City and County of San Francisco, Milton D. Sapiro, J., of possessing heroin, and he appealed. The District Court of Appeals, Wood, J., held that evidence sustained conviction.

Affirmed.

1. Poisons 🔑9

Evidence sustained conviction for possession of heroin. Health and Safety Code, § 11500.

2. Criminal Law 🔑553

Where defendant was charged in one count of indictment with possessing heroin and in another count of the indictment with raping prosecuting witness, and jury acquitted defendant on count dealing with rape, jury was not precluded from considering testimony of prosecuting witness with respect to count charging possession of heroin, even though they disbelieved her testimony on rape charge. Health and Safety Code, § 11500.

3. Criminal Law 🔑742(1)

Determination of credibility of a witness is function of trier of facts, even though trier of facts disbelieves the witness in part.

4. Criminal Law 🔑1030(2)

Contention, made for first time for defendant in final brief, that admission of evidence concerning physical examination of his arm deprived him of fair and impartial trial and compelled him to be a witness against himself in violation of due process clause of Fourteenth Amendment was not required to be considered by District Court of Appeal on appeal. U.S.C.A.Const. Amend. 14.

5. Constitutional Law 🔑266

In prosecution for possession of heroin, admission of testimony of physician, who examined defendant on morning after arrest, that there was a number of puncture wounds on defendant's left shoulder and upper arm, did not deprive defendant of a fair and impartial trial and compel him to be a witness against himself in violation of due process clause of federal Constitution, where defendant had been arrested pursuant to a warrant, arresting officers had been admitted to defendant's home after announcing that they were officers, and there was no indication that force was used by officers or any brutality. Health and Safety Code § 11500; U.S.C.A.Const. Amend. 14.

6. Constitutional Law 🔑266

A rule of evidence, which is applicable to criminal proceedings in a state court, and which allows introduction of evidence illegally obtained, does not on that account alone offend due process clause of Fourteenth Amendment to federal Constitution. U.S.C.A. Const.Amend. 14.

J. Maxwell Peyser, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant appeals from the judgment rendered upon his conviction of possessing heroin in violation of section 11500 of the Health and Safety Code, and from the order denying his motion for new trial.

He claims (1) the evidence was insufficient to show possession by the defendant because (a) proof that he knew of the existence of this substance, or of the package in which it was found, is lacking, and (b) the manner in which the package was found makes it inherently improbable that there was any possession in the defendant, and (2) the admission of certain evidence deprived defendant of a fair trial and thus violated the due process clause of the Fourteenth Amendment to the United States Constitution.

[1] (1) *As to the sufficiency of the evidence,* examination of the record compels the conclusion that the verdict finds ample support in the evidence. A brief narrative of the testimony will suffice.

The package was found in a lightwell opposite bathroom windows in the apartment occupied by defendant and one Mildred Johnson. There was no other access to this lightwell except from the roof, for the wall of the adjoining house was solid, without a window or other opening and the two houses were but an inch or an inch and a half apart. When the police arrived Mildred Johnson came to the door, asked who was there, and was told "It's the police." She then said in a rather loud voice, "The cops are here." About thirty seconds later she opened the door and the police entered. Officer O'Brien headed across the living room and met defendant coming from the direction of the bathroom. O'Brien immediately went to the bathroom. He found no narcotics. There were two windows, both open at the top. He looked into the lightwell and on the bottom was a small brown package tied with a rubber band. He retrieved the package. The night was foggy and other papers in the lightwell were damp. The lightwell itself was moist. The brown package was dry. The package contained two needles inserted in a roll of adhesive tape and a number of small white paper packets which contained a white powder. The package contained 28 bindles totaling 47 grains of heroin. The practice of users of heroin is to dissolve some of the powder in a spoon and inject it into themselves through a hypodermic needle attached to an eyedropper. Defendant was examined by a physician the next morning. The physician testified that he found on defendant's upper left arm and shoulder over 25 puncture wounds, some of 24 hours' or less duration and some were older and might have been of a week or 10 days' duration.

A prosecution witness, Anita Sturgis, testified that some eight days before, in this apartment, defendant put something into a spoon, then put in some water and with a needle attached to an eyedropper injected the solution into the arm of one Nancy, then Mildred and then himself. Other persons present also took injections. Anita did not receive an injection. Defendant asked her if she wanted one, but she said no. He said they were injecting cocaine into themselves. Later that day, Anita saw the people at the apartment taking more injections in the upper arm, which they called a "skin pop." That night Anita stayed at the apartment. The next day she saw more injections being taken of the substance they called "coke" or "cocaine." She saw defendant go to the bathroom window and take out a box which he put on the kitchen table. The box was wrapped in a newspaper, which he removed. In it were little white papers which he took out, unfolded and put the contents into a spoon. He told her that the box was kept on the window ledge outside. He did not want it in the house.

[2, 3] At the oral argument, but not in his briefs, defendant contended, without citation of authority, that Anita Sturgis' testimony is not available for consideration in ascertaining the sufficiency of the evidence. He predicated this contention upon the facts that the indictment, in a separate count, accused him of having raped Anita

Sturgis, and the jury acquitted him upon that count. He argued that the jury by its acquittal demonstrated its disbelief of Anita's testimony as to that charge, and concluded, as a matter of law, that all the rest of her testimony must be disbelieved and rejected. That is not the law. Determination of the credibility of a witness is the function of the trier of the facts. This includes the witness whom the trier of the facts disbelieves in part. Disbelief of part of the testimony of a witness does not require rejection of the rest of that witness' testimony. Rolland v. Porterfield, 183 Cal. 466, 470, 191 P. 913; People v. Holman, 72 Cal.App.2d 75, 89–90, 164 P.2d 297; 27 Cal.Jur. 182–186, Witnesses, §§ 156 and 157.

The evidence we have narrated would reasonably support inferences that defendant knew of the package, that he had placed it in the lightwell, and that he knew it contained narcotics. This evidence is similar to, and if anything stronger, than that which was found sufficient in People v. Bassett, 68 Cal.App.2d 241, 156 P.2d 457.

[4, 5] (2) *As to due process.* In his reply brief, filed after oral argument, with permission to present a certain point, not this point, defendant claims that evidence of the physical examination of his arm deprived him of a fair and impartial trial and compelled him to be a witness against himself in violation of the due process clause as interpreted and applied by the United States Supreme Court in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. ——. While such a contention made for the first time in a final brief need not be considered, Kahn v. Wilson, 120 Cal. 643, 53 P. 24, we will nevertheless entertain it because it illustrates a misconception of the effect of the Rochin case upon the administration of criminal justice.

During the course of the trial a physician testified, without objection from defendant, that he had examined defendant on the morning after his arrest and found on defendant's left shoulder or upper arm a number of puncture wounds, some of which may have been of 24 hours' or less duration. A police officer testified that he took defendant to the physician for the examination. The officer was asked but upon defendant's objection was not permitted to testify concerning the purpose of the examination. The effect of this evidence was to allow the jury to draw an inference that defendant was an addict. There was testimony that defendant on several occasions had taken "shots" of what he called "coke" or "cocaine." These "shots" were administered in his left upper arm or shoulder.

That the ruling in the Rochin case does not apply in this case is readily apparent from an examination of the decision in that case. There the court deemed the conduct of the officers when they arrested the defendant without a warrant such as was "bound to offend even hardened sensibilities" and "too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. 165, 72 S.Ct. 205, 210, 96 L.Ed. ——. The brutal conduct of the arresting officers, not the defendant's involuntary self-incrimination, was the crucial and critical element. The arresting officers forcibly broke into defendant's home. They saw some capsules on a night stand. Defendant put them into his mouth. The officers choked him in an attempt to force him to disgorge them. This failing, defendant was taken to a hospital where an emetic solution was forced into his stomach against his will, causing him to emit the capsules, which proved to contain morphine. The capsules were introduced into evidence at his trial and were the basis of his conviction for the possession of narcotics. Of this the court said "to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." 342 U.S. 165, 72 S.Ct. 205, 210, 96 L.Ed. ——.

The conduct of the arresting officers in the instant case was in sharp contrast to that of the officers in the Rochin case. Here the officers were admitted to the home of defendant after announcing that they were officers. Defendant was arrested pursuant to a warrant and was taken to a physician who examined his upper left arm.

There is no indication that force was used, nor any hint of brutality. We find no basis for applying in this case the ruling made in the Rochin case.

[6] Even if the evidence of the puncture wounds on defendant's arm were illegally obtained (we do not hold that it was), the judgment should nevertheless be affirmed. A rule of evidence applicable to criminal proceedings in a state court which allows the introduction of evidence illegally obtained does not on that account alone offend the due process clause of the Fourteenth Amendment to the United States Constitution. Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 discussed in 38 Cal.L.Rev. 498. See, also, Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. ——, decided at the same term as the Rochin case. The testimony of the doctor in our case has nothing in common with the forced confessions used in violation of the due process clause in Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; or Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192. The admission of involuntary self-incriminating evidence not procured by force or violence does not violate the due process clause. Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903. Rather, it is brutality in the procuring of the evidence which is condemned. This was made clear by Mr. Justice Frankfurter in the Rochin case when he said: "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record." 342 U.S. 165, 72 S.Ct. 205, 210, 96 L.Ed. ——.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

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114 Cal.App.2d 87

KENNEDY v. ROSECRANS GARDENS, Inc.

Civ. 19087.

District Court of Appeal, Second District,
Division 3, California.
Nov. 7, 1952.

Action by purchaser against vendor for injunction and for damages for trespass on property conveyed between date of agreement for conveyance and date deed was delivered out of escrow. The Superior Court, Los Angeles County, William R. McKay, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that defendant could not make any changes in the property during such period which would deprive plaintiff of the full benefit of his bargain, and changes made constituted a trespass for which defendant was entitled to an injunction, or in the alternative, compensation in damages.

Reversed.

1. Trespass ⚿10

Vendor and Purchaser ⚿191

Where landowner had contracted to convey to another, landowner could not between date of agreement and date deed was delivered out of escrow make any changes in the land which would deprive the other of full benefit of the bargain, and therefore landowner in making such changes was guilty of trepass.

2. Pleadings ⚿127(2)

Denial of allegation in complaint that plaintiff had been damaged by defendant's trespass in the sum of $3,500 was merely a denial that plaintiff had suffered damage in the amount of $3,500 and was an admission that plaintiff had suffered substantial damage.

3. Adjoining Landowners ⚿6

Landowner had duty to protect adjoining landowner's property from injury occasioned by change of grade of first landowner's property.

4. Injunction ⚿194

Where landowner raised grade of his land and deposited earth and debris on adjoining landowner's property, and water from garden from landowner's property came down and brought dirt onto adjoining landowner's property, landowner's acts constituted substantial interference with full and free use of adjoining landowner's property, and adjoining landowner was entitled to an injunction against such acts or, in the alternative, compensation in damages.

5. Pleading ⚷237(5)

Although purchaser did not plead agreement for conveyance of real property in action against vendor for trespass, where agreement was introduced in evidence without objection and agreement and deed were part of a single transaction and case was tried upon theory that entire transaction was before court for adjudication, purchaser would be permitted to amend complaint to plead agreement.

Conroy, Conroy & Light, Los Angeles, for appellant.

Charles T. Lester and Jesse A. Levinson, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff sues for damages for trespass upon his land and for an injunction. He appeals from a judgment for defendant.

Plaintiff owned a parcel, we shall call "A", 145 feet wide and more than 900 feet in length. Defendant owned "B" immediately east of "A". Plaintiff owned parcel "C" immediately east of "B". Both parties were desirous of subdividing their respective parcels. They entered into an agreement under which defendant agreed to convey to plaintiff a strip along the westerly edge of "B" ranging in width from 17 to 28 feet which we shall call "D". Plaintiff conveyed "C" to defendant and received a purchase-money trust deed for $2,500. It was agreed that if defendant did not subdivide "C" within six months it would reconvey "C" to plaintiff and he would give a release of the trust deed.

The deeds, with the agreement, were placed in escrow on or about February 6, 1951 and were recorded May 25, 1951. Defendant did not subdivide "C", but reconveyed it to plaintiff who gave a release of the trust deed. Plaintiff therefore retained title to the strip "D".

Defendant subdivided "B" and in doing so raised the grade 24 or more inches. By plaintiff's evidence, which was not controverted, it was established that after raising the grade defendant caused to be deposited earth and debris on "D" to a width of several feet; water from the gardens on "B" comes down and brings down more dirt; the slope in this area is from 45 to 60 degrees.

[1] Defendant does not deny that the acts complained of would ordinarily constitute a trespass. Its defense is based upon the fact that it commenced raising the grade of "B" February 7th, the day after the agreement was made, and had created the condition described before its deed to plaintiff was delivered out of escrow. It contended, successfully, that plaintiff did not take title to the land until close of the escrow and that he cannot complain of conditions as they were at that time. This argument fails to give any effect to the agreement. Defendant was bound to convey "D" to plaintiff and could not between the date of the agreement and the deed make any changes in the subject of the agreement which would deprive plaintiff of the full benefit of his bargain. The parties devote much argument to the question whether the passing of title by delivery of the deed would relate back to February 6, 1951, the date of the deed. This is not the question. It was not the deed, but the agreement which determined the rights of plaintiff. He had objected when earth was first shoved onto his property by defendant's bulldozers and defendant had removed it, only to encroach with earth and debris from time to time, both before and after May 25th. Plaintiff was not required to take the property in a damaged condition. Moreover, defendant's continued acts of trespass were wrongful.

Plaintiff did not prove the amount of his damage. He gave evidence that a wall 900 feet long would be required to protect his property and estimated its cost at $3,400. He also testified that there would be a continuing deposit of water and earth upon his land, unless it was protected, and that he intended to build houses upon lots which would extend the full depth of his parcels "A" and "D".

[2] Plaintiff alleged in paragraph VII of his complaint he had been damaged in the sum of $3,500. Defendant denied "each and every allegation" of paragraph VII. The court found the allegations of paragraph VII to be untrue but made no other findings as to damage. The answer was merely a denial that plaintiff had suffered damage in the amount of $3,500 and was an admission that he had suffered substantial damage. Beetson v. Hollywood Athletic Club, 109 Cal.App. 715, 293 P. 821; Prentice v. Zumwalt, 124 Cal.App. 646, 13 P.2d 379; Armer v. Dorton, 50 Cal.App.2d 413, 123 P.2d 94; Janeway v. Carpender & Long Beach Paper & Paint Co., 190 Cal. 150, 211 P. 6; 8 Cal.Jur., p. 894; 21 Cal. Jur., p. 154. But the insufficiency of the denial and the findings as to damage may be overlooked.

[3] It was defendant's duty to protect plaintiff's property from injury occasioned by the change of grade. Kuhr v. City of Seattle, 15 Wash.2d 501, 131 P.2d 168; Sime v. Jensen, 213 Minn. 476, 7 N.W.2d 325, 1 Cal.Jur.2d, p. 731.

[4] Plaintiff was entitled to an injunction against the continued and threatened wrongful use of his property unless the harmful results thereof were of such a trivial nature as to come within the maxim de minimis, 14 Cal.Jur., pp. 221, 224; 24 Cal.Jur., p. 700, or, in the alternative, compensation in damages. See Spaulding v. Cameron, 38 Cal.2d 265, 239 P.2d 625. Upon the undisputed evidence the acts of defendant constituted a substantial interference with the full and free use of plaintiff's property.

[5] Plaintiff did not plead the agreement of February 6th but it was introduced in evidence by plaintiff without objection. The agreement and the deed were all part of a single transaction. Plaintiff's attorneys, in their opening statement, stated the terms of the agreement. The case was tried upon the theory that the entire transaction was before the court for adjudication although the significance of the agreement appears to have been overlooked. When the agreement is considered with the deed, which bore the same date as the agreement, the deed necessarily relates back to the date of the agreement. Plaintiff should be permitted to amend his complaint to plead the agreement.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

114 Cal.App.2d 52

PEOPLE v. BROWN.

Cr. 4802.

District Court of Appeal, Second District,
Division 3, California.
Nov. 6, 1952.

Defendant was charged in the Superior Court, Los Angeles County, Clement D. Nye, J., with grand theft. In a trial by jury he was found guilty. Proceedings were suspended and probation was granted, and he appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to support the finding of grand theft.

Affirmed.

1. Larceny ⚿14(1)

Grand theft by trick and device usually results when victim of fraud intends not to pass complete title to his property but merely that it shall be applied to a special purpose, while recipient of property intends to appropriate it to his own use.

2. Embezzlement ⚿47
False Pretenses ⚿51
Larceny ⚿68(1)

In grand theft prosecution, evidence was sufficient for jury on each of three submitted theories, namely, larceny by trick and device, obtaining property by false pretenses, and embezzlement. Pen.Code, § 1237, subd. 1.

3. Criminal Law ⚿761(11)

Instruction regarding three forms of theft was not subject to claimed infirmity of presupposing that some type of theft was committed, where jury was instructed, in effect, that if it found that defendant committed any of the three kinds of theft, and it unanimously agreed as to which kind, it should return verdict of guilty.

4. Criminal Law ⚿822(13)

In view of all of instructions given in grand larceny prosecution, there was no prejudicial error in giving instruction regarding direct and circumstantial evidence, notwithstanding defendant's contention that such instruction should also have advised jury that, upon such evidence, it might find him innocent of crime.

5. Criminal Law ⚿304(11), 719(1)

In grand larceny prosecution, judicial notice could be taken of law of sister state, and therefore it was not error to permit deputy district attorney to argue that defendant could have found out where cattle brand was registered by going to county seat of county in such other state, notwithstanding absence of evidence regarding recording of cattle brands. Code Civ. Proc. § 1875, subd. 3; A.C.A.1939, § 50–315.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with grand theft of $1,800 from Arthur A. Matthews. In a trial by jury he was found guilty. Proceedings were suspended and probation was granted. He appeals from the order granting probation. See Pen.Code, sec. 1237, subd. 1.

Appellant contends that the verdict is against the evidence and the law; that the court erred in giving and failing to give certain instructions; and that it erred in matters of law.

At the time of the alleged offense, February 16, 1950, the appellant, his wife and two children were living with his wife's cousin, Mrs. Wilk, in her home at Puente. They had lived there approximately two months. Appellant's wife testified that they had no money with which to pay Mrs. Wilk for board or lodging. During that time, according to appellant's testimony, his Plymouth automobile was demolished in an accident.

Mr. and Mrs. Matthews and their son Don, who was 21 years of age, resided in Riverside. They had known appellant and his wife about six years. On February 15, 1950, appellant and his wife went to the Matthews home, and appellant told Mr. Matthews, in the presence of Don, "about" a deal he had for the purchase of wild cattle in Arizona, and he said he needed $1,800.

Mr. Matthews testified that appellant told him the cattle were along the Colorado River south of Topock; appellant drew a map (People's Exhibit 1) and pointed to a place thereon which he said was a ranch; he said the cattle belonged to that rancher, an old man who wanted to get the cattle out of there; he drew a road on the map and said it was a road to the ranch and the cattle—that to go where the cattle were, a person would go 2½ miles east from Topock, then turn south onto a sandy road and go 24 miles to the ranch, which was at the end of the road; appellant said that he had been there, had seen the cattle and estimated there were about 100 cattle; appellant said that he was to pay the rancher 5 cents a pound for the cattle he took out and that the rancher demanded a deposit of $3,000; the appellant said he had $1,200, and he asked Mr. Matthews for $1,800; appellant said that he was to meet the rancher in Los Angeles the next day and he had to put the money up or the rancher would give the deal to someone else; he (Matthews) said that he would think it over and would see appellant the next day.

The next day, February 16th, Mr. Matthews and Don went to the home of Mrs. Wilk and had a further discussion with appellant regarding the cattle. Then appellant, Mr. Matthews and Don went to the office of a notary public. Mr. Matthews testified that the appellant told the notary that they wanted an agreement and the notary typed what appellant said he wanted in the agreement. The said writing (Exhibit 2) was signed by Mr. Matthews and appellant. It was as follows:

"El Monte, California
February 16th 1950

"Arthur A. Matthews
9657 Hastings Blvd
Riverside, California

"Dear Sir:

"I propose to enter into a project of Buying, Catching, and Selling of Wild Cattle, of any Brands or Marks, within the State of Arizona, and offer you the opportunity of participating in one-half of the profits derived therefrom, with the understanding that you advance me the sum of Eighteen ($1800) hundred Dollars towards the project, it being understood that I have to date put into this deal Twelve Hundred ($1200) Dollars.

"It is understood that this project shall be completed within six months from date hereof, and that all proceeds shall be split 50–50 after the return to you of your $1800, and my $1200, all expenses of this project to be deducted from said settlement.

"Acceptance of the above shall put this agreement into effect.

"John Mark Brown
John Mark Brown

"Above fully accepted by
me this 16th day of Feb. 1950.
Arthur A Matthews
Arthur A. Matthews."

After the agreement was signed, appellant, Mr. Matthews and Don returned to the home of Mrs. Wilk. Mr. Matthews gave appellant $1,800 in cash—in $100, $50 and $20 bills. Appellant told him not to discuss the matter with Mrs. Wilk. Then after Mr. Matthews and Don went home, the appellant, according to the testimony of Mrs. Wilk, came into her house, showed her a large roll of bills and said, "That's the kind of a friend to have. He is a grand fellow and he gave me five years to pay it back, which is the best part of it."

The next day, February 17th, appellant purchased a new 1950 Mercury automobile. He made a cash payment of $1,700 on the purchase price. The salesman, who sold the automobile, testified that appellant paid that amount in bills of large denominations —$100, $50 and some $20 bills. Mrs. Wilk's husband testified that the day after appellant purchased the automobile appellant said that a friend let him have some money to buy a new car—that it was a loan to be paid off in five years. About February 21st, appellant went to the Matthews home in the new automobile; thereafter Mr. Matthews did not see appellant until the preliminary hearing (about 16 months later). Mr. Matthews testified that he wrote letters to appellant, addressed to two places in Arizona, which addresses he had obtained from appellant's relatives; he received no reply from appellant, but appellant's wife answered two of the letters.

Mr. Matthews testified further that at the time he gave the $1,800 to appellant he was relying on appellant's statements that the cattle were located 24 miles south of a point 2½ miles from Topock; that there were 100 cattle and appellant had seen them; that appellant had $1,200 to apply on the deposit; and that appellant could get the cattle for 5 cents a pound.

Don Matthews' testimony, as to the conversations between appellant and his father, was substantially the same as that of his father.

The chief of police of Needles, California, testified that he was acquainted with the territory from Topock south to the Parker Dam; for the past 15 years he had been through it on an average of three times a month; there were no cattle in that territory in 1950.

Another witness testified that he had lived in the vicinity south of Topock from October, 1948, to September, 1950; a Mr. Hunter put 29 head of cattle in there in 1949 and took them out in November of that year; he saw no wild cattle in that territory and heard of none.

An investigator for the district attorney testified that he obtained the map (which appellant had made) from Mr. Matthews and took it to Topock; he proceeded east, following the map, to the point 2½ miles from Topock, then turned south and went

7½ miles to the end of the road, in the mountains, where there is an old abandoned mine; he took photographs of the mine, showing the background and the end of the road.

Appellant testified that in the early part of October, 1949, he met J. T. Gowd in Parker, Arizona; then appellant left Parker and proceeded north to the Bill Williams River where he saw 7 or 8 bunches of wild cattle; he returned to Parker and made inquiries as to who owned the cattle; Gowd said he had cattle running in there and had a ranch south of Topock; appellant said he would pay him 5 cents a pound for all of the old cattle and 16 cents a pound for cattle less than 3 years old, and they agreed to meet again in Parker in January, 1950; they met at said time and agreed that the deal should go through as planned provided the appellant put up $3,000 and that they would meet again in Los Angeles on February 18th; while returning home, appellant's automobile was demolished; when he talked with Mr. Matthews on February 15th, they discussed catching wild cattle and he (appellant) told him about different bunches of cattle, and he told him about his deal with Gowd; he did not ask Mr. Matthews for money, but Mr. Matthews said he was interested in a deal like that, or anything to make money at that time; appellant told him where Gowd said the ranch was and drew the directions on the map from information Gowd had given him; appellant had never been there; he told Matthews that if the deal worked out "to a profit" that they would go farther down the river to other bunches of cattle—the Goulette cattle at Cibola and the Wilson cattle; he told Matthews it would take $3,000, including the cost of grain, groceries and equipment, and that he agreed to give Gowd $2,000 cash as a deposit, and that he (appellant) needed $1,800; on February 16th, they went to the office of the notary public, and he and Matthews told the notary what they wanted; appellant drew the map in the office of the notary after the agreement was signed; after they returned to the Wilk residence, appellant told Matthews not to discuss the matter with Mrs. Wilk; on February 18th, he met Gowd in Los Angeles and Gowd wanted $2,000 in cash paid at that time, but appellant said he would deliver the "$3,000.00" in Topock, and they agreed to meet in Topock within a week or ten days. Appellant also testified that he agreed to meet Gowd at his ranch; on February 17th, he purchased a Mercury automobile and paid $1,700 cash, with money he got from his father; about eight days later, he went to Topock where he "found just exactly what" the investigator for the district attorney found "according to his maps"; he inquired about Gowd but he did not see him then or thereafter. He testified further that he then went to Corona, California, and talked to Richard Goulette regarding his cattle, and made the same deal with Goulette that he had previously made with Gowd; about March 27th, appellant, his father and Goulette started to chase the cattle, and within about five weeks they caught "between 35 and 42" of them; they repaired an old corral and put the cattle in it; that night he paid Goulette $2,300 cash for the cattle, and Goulette gave him a bill of sale (Exhibit B); the $2,300 was money he got from Matthews and appellant's brother, and part of it was appellant's; the next morning appellant, his father and Goulette went to the corral for the purpose of loading the cattle, but the corral had been torn out and the cattle had gone into the brush; appellant, his father and Goulette worked in the brush about a week longer to get more cattle, but it was too hot and they returned to Yuma; appellant wrote Matthews two letters but received no answer. Appellant also testified that he received two letters from Matthews; he did not answer any letters he received from Matthews but his wife answered about "four" of them. He also testified that when he took the $1,800 he did not intend to use it for his own benefit, and he used no part of it for such purpose.

Richard Goulette testified that in 1950 he owned approximately 75 head of branded cattle in the Cibola Valley; the cattle were wild, and he made a deal with appellant; they corralled about 25 of them, and the appellant paid him $2,300; the next morning the cattle were gone—the corral had been broken; there was no conversation about the $2,300—it was his (Goulette's) money.

Appellant's father testified that he helped appellant and Goulette bring cattle into the pen, and he saw appellant give Goulette some money; the next morning the pen was broken down and the cattle were gone. He also testified that in February, 1950, he lent appellant $2,000 in cash to buy an automobile; he (witness) had "saved it up over a period of time, and I got it from a number of people that I wouldn't know"; he had kept the money in a tin box in his home.

[1, 2] As above stated, appellant contends that the verdict is against the evidence and the law. He asserts that the evidence is insufficient to establish the commission of the crime of theft under any theory. An instruction was given wherein three forms of theft, namely, larceny by trick and device, obtaining property by false pretenses, and embezzlement, were distinguished. The jury was also instructed that if it found that the defendant committed any of the three kinds of theft it would not be necessary to state in the verdict which kind was committed. The verdict stated that defendant was guilty of grand theft, but it did not specify which kind of theft was committed. Appellant argues that a necessary element of grand theft by trick and device was lacking, since the money was not to be applied to a "described purpose." Grand theft by trick and device "usually results when the victim of a fraud intends not to pass complete title of his property but that it shall be applied to a special purpose while the recipient of the property intends to appropriate it to his own use." People v. McCabe, 60 Cal.App. 2d 492, 496, 141 P.2d 54, 57; People v. Chamberlain, 96 Cal.App.2d 178, 182, 214 P.2d 600, 603. It was stated in People v. Malone, 20 Cal.App.2d 1, at page 6, 66 P.2d 216, 218, that "[W]hen a person, with intent to defraud, obtains possession of the property of another upon the understanding that it is to be used for a definite object and fails to so use it, such person is guilty of larceny by trick and device." There was evidence herein from which the jury could have found that Mr. Matthews was induced to part with his money by false representations of appellant that he had to deposit $3,000 with a Mr. Gowd in order to purchase Gowd's cattle; that Mr. Matthews, in delivering the money to appellant, intended that it be used as part of such deposit; and that the appellant intended to appropriate the money to his own use. The evidence was sufficient to support a finding of grand theft by trick and device.

Appellant also contends that the evidence would not support a conviction of theft under the theory of embezzlement and that the court erred in instructing the jury regarding embezzlement. The question as to the intent with which Mr. Matthews delivered the money to appellant and the intent with which appellant received the money were, of course, questions of fact. It cannot be said, as a matter of law, that the evidence would not support a finding of embezzlement. It was proper for the trial court to define theft and it was not error for it to include a definition of embezzlement.

[3] Appellant contends further that the last paragraph of the instruction regarding the three forms of theft was not "favorable" to him for the reason that it presupposes that a type of theft was committed. That last paragraph was as follows: "However, it is necessary that you all agree as to which of the three types of theft was committed. If you should not be able to do that, the unanimity of decision necessary to warrant a verdict of 'guilty' would be lacking, and it would be improper for you to deliver such a verdict." It is to be noted that the paragraph preceding said last paragraph was as follows: "If you should find that the defendant committed any of the three kinds of theft just mentioned, you should return a verdict of guilty, and it will not be necessary or proper for you to state in your verdict which of the three forms of theft was committed." By those two paragraphs the jury was instructed, in effect, that if it found that defendant committed any of the three kinds of theft, and if it unanimously agreed as to which kind, it should return

a verdict of guilty. It was not error to give said instruction.

[4] Appellant contends that the court erred in giving the following instruction: "Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. * * Either will support a verdict of guilt if it carries the convincing quality required by law, as stated in my instructions." Appellant asserts that since "so much of the evidence is circumstantial," the giving of the instruction was prejudicial for the reason that it emphasized the guilt of the accused. He argues in effect that said instruction should also have advised the jury that, upon such evidence, it might find an accused innocent of crime. The jury was instructed further that a "defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." It was also instructed that it was not permitted, on circumstantial evidence alone, to find the defendant guilty "unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." It was also instructed that when the case "against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its findings solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt." In view of all of the instructions which were given, there was no prejudicial error in giving the above-quoted instruction regarding direct and circumstantial evidence.

[5] Appellant also contends, as shown above, that the court erred in matters of law. In his argument before the jury, the deputy district attorney stated: "Gowd is what is known in our business as the mysterious stranger. * * * He had a registered brand, apparently registered in the State of Arizona. All he [appellant] had to do was to go to Phoenix or to the county seat of that particular county and find out where this brand was registered." Appellant asserts that the court erred in permitting that statement to stand since there was no evidence in the record regarding the recording of cattle brands. The statement of the deputy district attorney was not improper. According to the law of Arizona, the owner of range livestock is required to adopt and record a brand for such stock. Ariz.Code Ann.1939, sec. 50–315. Judicial notice may be taken of the law of Arizona. Code Civ.Proc. sec. 1875, subd. 3.

Other contentions of appellant are that the court erred in not giving instructions defining the words "fraud, artifice, trick, device, false token, and false writing"; and in not giving an instruction that testimony purporting to relate to oral admissions should be viewed with caution. Those contentions are not sustainable. The jury was instructed adequately.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

39 Cal.2d 729

RICHFIELD OIL CORP. et al. v. CRAWFORD et al.

L. A. 21956.

Supreme Court of California, in Bank.
Oct. 21, 1952.

As Modified on Denial of Rehearing
Nov. 17, 1952.

Action by an oil company for injunctive, mandatory and declaratory relief from drilling of an oil well on land which defendants and plaintiffs in intervention had interest. The Superior Court, Santa Barbara County, Charles F. Blackstock, J., rendered a judgment for defendants and plaintiffs and the defendants in intervention appealed. The Supreme Court, Traynor, J., held that statute declaring an oil well located within one

hundred feet of outer boundary of parcel of land on which well is situated to be a nuisance applies only to surface location of oil well and does not apply to producing interval thereof.

Judgment affirmed.

For prior opinion, see 241 P.2d 1020.

1. Mines and Minerals ⚷92.23

In interpretation of section of oil well spacing legislation such legislation would be considered as a whole, and inquiry into proper interpretation of such section would not be guided solely by dictionary meaning of each word standing alone. Public Resources Code, § 3600.

2. Statutes ⚷223.1

Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.

3. Statutes ⚷219

Contemporaneous administrative construction of statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

4. Estoppel ⚷62(2)
Statutes ⚷223.5(1)

Although failure to enforce statutes will not estop state agency from their subsequent enforcement, past administrative action is evidence of limits of power to act, particularly when a statute is reenacted without a change in light of a settled administrative interpretation.

5. Mines and Minerals ⚷92.2

Legislature has power to prevent waste of oil and gas.

6. Statutes ⚷184

The objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation.

7. Mines and Minerals ⚷92.23

Statute declaring an oil well located within one hundred feet of an outer boundary of parcel of land on which well is situated to be a nuisance applies only to surface location of oil well and does not apply to producing interval thereon. Public Resources Code, §§ 3600, 3606, 3608.

8. Evidence ⚷536

Surveyors and civil engineers may give testimony on questions involving matters of technical skill and experience with which they are peculiarly acquainted.

9. Evidence ⚷518

In action by an oil company for injunctive, mandatory and declaratory relief from drilling of an oil well on land which defendants and plaintiffs in intervention had interest, wherein boundary between properties was an issue, a civil engineer, and a chief engineer and a surveyor for county, and a licensed surveyor, and other experts, were properly permitted to testify regarding proper method of surveying a line, not to vary or contradict deed but to aid court in translating words of deed into monuments on surface of earth, in accord with accepted surveying practices.

10. Boundaries ⚷6

Unless other terms of a deed or admissible extrinsic evidence show that a different method was intended by parties, a "due north" call should be surveyed on an astronomical basis.

11. Boundaries ⚷3(5)

Call in deed to known boundary line of land prevails over call to its astronomical bearing.

12. Boundaries ⚷6

Special interpretation of words "due north" used in call of quitclaim deed could not be enforced against a party relying upon words of deed and not knowing special meaning attached thereto by other party to deed. Civ.Code, § 1645.

13. Boundaries ⚷37(1)

In action by an oil company for injunctive, mandatory and declaratory relief from drilling of an oil well on land adjacent to plaintiff's land, trial court under evidence properly found that defendants' method of surveying description in deed was proper and that defendants' well was located entirely on land sub-leased by defendants, as against contention that defendants had committed underground trespass by drilling producing interval outside land sub-leased by defendants.

Cree & Brooks, John W. Brooks, Long Beach, Marlon F. Schade, Los Angeles, Griffith & Thornburgh, C. Douglas Smith, Santa Barbara, O'Melveny & Myers, Jackson W. Chance, and Rodney K. Potter, Los Angeles, for appellants.

Everett S. Layman, Kenneth S. Carey, San Francisco, Howard H. Bell, Bakersfield, Richard E. Tuttle, Los Angeles, Lawrence L. Otis and James F. Healey, Jr., Los Angeles, as amici curiae, for appellants.

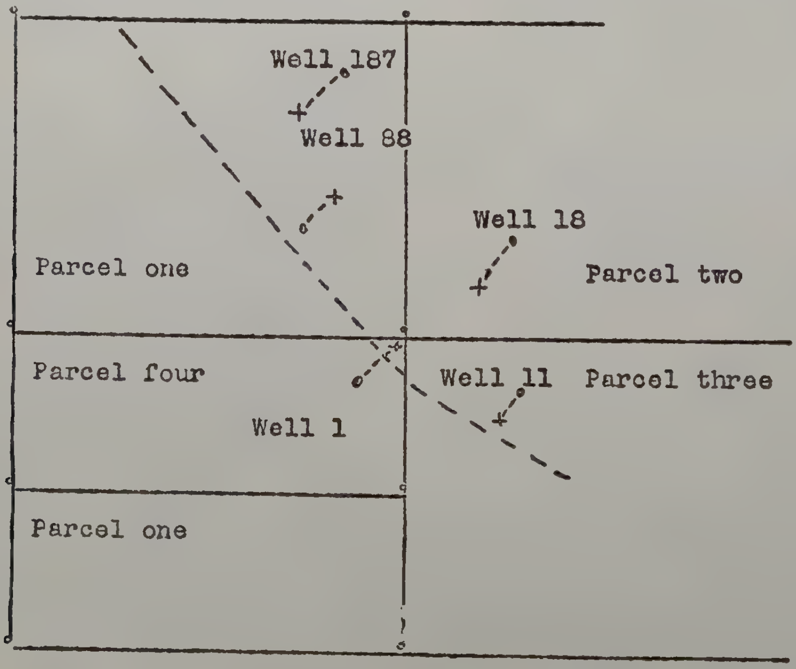
Joseph A. Ball, Clark Heggeness, Ball, Hunt and Hart, Long Beach, Schauer, Ryon & McMahon, Thomas M. Mullen, Santa Barbara, and Harry E. Templeton, Los Angeles, for interveners and respondents.

Arthur C. Fisher, Overton, Lyman, Prince & Vermille, Donald H. Ford, Faries & McDowell, McIntyre Faries and Wayne R. Hackett, Los Angeles, as amici curiae for respondents.

TRAYNOR, Justice.

This appeal involves the interpretation and application to certain parcels of land of section 3600 of the Public Resources Code regulating the spacing of oil and gas wells. The accompanying diagram shows the relationship of the parcels and the wells thereon. All oil wells are producing from the Colgrove formation in the Cuyama oil field. The dotted line across the diagram represents the Hadley-Stone fault, running in a northwest-southeast direction. This fault acts as a barrier to oil and gas and thus limits production to that portion of the Colgrove formation north and east of the fault.

All of the property is owned by H. S. Russell. In 1945 he leased the property to the Norris Oil Company. Subsequently in 1945, Norris subleased parcels two and three to predecessors in interest of plaintiff Richfield Oil Corporation. In 1947 Norris subleased parcels one and four to Carpenter and Henderson, plaintiffs in intervention. In 1948 Carpenter and Henderson subleased parcels one and four to Anderson Associates who in turn assigned an undivided half-interest therein to Richfield. Shortly thereafter Anderson Associates and Richfield quitclaimed all their interest in parcel four to Carpenter and Henderson. In June 1949 Carpenter and Henderson subleased parcel four to defendants Crawford and Hiles. Since July 25, 1949 defendants have been producing oil from Well 1. The surface location of this well is more than 200 feet from the boundaries of parcel four, but its producing interval or bottom is in oil producing land northeast of the fault, less than



100 feet from the boundaries of defendants' property. Richfield is sublessee under oil and gas leases for parcels one, two, and three, and is producing oil from Wells 88, 187, 18 and 11 on those parcels.

Richfield sought to enjoin operation of Well 1 and recover damages for its past operations on two theories: that the well was operated in violation of Public Resources Code, § 3600 and that it constituted a subsurface trespass on Richfield's property. In a third action Richfield sought a declaration as to the location of the boundary between the parcels in relation to the subsurface location of Well 1. Plaintiffs in intervention, Carpenter and Henderson, sought declaratory relief to have their rights declared respecting royalty interests in Well 1. The trial court denied Richfield injunctive and monetary relief, declared that the well was entirely within defendants' property, and declared that Carpenter and Henderson owned 23 per cent of the production of Well 1 and that Richfield had no interest therein. Richfield appeals from the judgment.

Construction of section 3600

Section 3600 provides that "any well hereafter drilled for oil or gas, or hereafter drilled and permitted to produce oil or gas, which is located within one hundred feet of an outer boundary of the parcel of land on which the well is situated, or within one hundred feet of a public street or road or highway dedicated prior to the commencement of drilling of the well, or within one hundred fifty feet of either a well being drilled or a well theretofore drilled which is producing oil or gas or a well which has been drilled and is not producing but which is capable of producing oil or gas, is a public nuisance." Richfield contends that Well 1 is a public nuisance, on the ground that it "is located within one hundred feet of an outer boundary of the parcel of land on which the well is situated". Richfield concedes that the surface location of Well 1 is more than 100 feet from the boundary, but contends that the statute is violated when the producing interval of a well is less than 100 feet from the boundary. Defendants contend that section 3600 restricts only the surface location of oil wells and does not apply to the producing intervals thereof.

[1] Richfield urges that "well" is commonly understood to mean the entire shaft from the surface of the earth to the oil pool below and that in oil leases "boundary" usually includes "underground boundary." See Federal Oil Co. v. Brower, 36 Cal.2d 367, 370, 224 P.2d 4. Defendants urge on the other hand that the word "located" usually refers only to wells on the surface of the ground, see Union Pac. R. R. Co. v. City of Los Angeles, 53 Cal.App.2d 825, 829, 128 P.2d 408, and that the words "on which the well is situated" indicate that the statute regulates wells "on" a parcel as opposed to wells "in or under" a parcel. Cf. Richter v. Adams, 43 Cal.App.2d 184, 187, 110 P.2d 486. The word "well", or any other word in section 3600, cannot be disassociated from its context or the oil well spacing legislation as a whole. Thus, in section 3602 the context shows that "well" means the surface location, for the phrase therein "placed as to be as far from the lateral boundary lines of the parcel of land as the configuration of the surface and the existing improvements thereon will permit" could have no reference to the entire length of the shaft. Our inquiry into the proper interpretation of section 3600 cannot be guided solely by the dictionary meaning of each word standing alone; we must consider the well spacing legislation as a whole to determine the meaning of section 3600. People v. Moroney, 24 Cal.2d 638, 642, 150 P.2d 888; Myers v. Alta Construction Co., 37 Cal.2d 739, 742, 235 P.2d 1.

Comparison of section 3600 with other sections of the well spacing legislation supports defendants' interpretation. Thus section 3606, providing for the location of wells when the surface of the land is unsuitable for drilling, permits slant drilling into a parcel containing an acre or more when all or substantially all of the surface of such parcel is unsuitable for surface location of a well. This section also provides that in such cases the producing interval must be located not less than 75 feet from the outer boundary of the parcel into which it is drilled and that the surface location must be not less than 25 feet from the outer boundary of the parcel into which it is drilled. Section 3606 finally provides that "To enforce the provisions of this section" the State Oil and Gas Supervisor may require the operator to make a subsurface directional survey of the well and to file a plat of such survey with the supervisor, which is open to public inspection.

[2] Section 3600, however, does not provide that a subsurface may be required by the supervisor. Under Richfield's interpretation, although the Legislature has given the supervisor ample power to enforce part of the well spacing legislation, it fails to provide him with one of the most effective means of discovering violations of another part thereof.[1] If the Legislature intended enforcement of section 3600 to be left to action by private parties (as in the present case), difficulties remain. Section 3606 provides that the subsurface survey "shall be open to inspection by any other operator in the field in which the well is located." Section 3600, however, does not similarly protect adjoining landowners. Since sections 3600 and 3606 were reenacted together in 1947, it is difficult to believe that the Legislature would provide such contrasting enforcement procedures if it intended both sections to apply to subsurface locations of oil wells. "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." People v. Valentine, 28 Cal.2d 121, 142, 169 P.2d 1, 14.

An interpretation of section 3600 as applying only to the surface location of wells is supported by the administrative interpretation of that section since its enactment in 1931. The trial court admitted the deposition of R. D. Bush, State Oil and Gas Supervisor. It appears therein that from 1931 to 1945 his office interpreted section 3600 as applying only to surface locations of oil wells. Before any well was drilled or deepened, a notice of intention to drill was filed. Section 3203. If the surface location of the proposed well was within 100 feet from the boundary of a parcel of property, the supervisor served a notice of disapproval on the operator and, if drilling continued in disregard of the disapproval, the supervisor requested the attorney general to abate the well as a public nuisance. During this period of fourteen years the supervisor did not make any investigation regarding the location of the producing interval of wells. In 1945, section 3606 was added to the code and thereafter the supervisor required all operators wishing to drill wells under that section to include in their notices of intention to drill a statement of the proposed bottom hole location, and also required the filing of subsurface directional surveys. When wells were not drilled under section 3606, the policy remained the same as that since 1931. In 1947, section 3608 was added to the code and the other sections were reenacted. The policy of the supervisor remained unchanged.

[3, 4] It thus appears from the record that during the nineteen years preceding trial of this action section 3600 was consistently interpreted by the supervisor as applying only to the surface location of wells. "[T]he contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1, 2; Holloway v. Purcell, 35 Cal.2d 220, 226, 217 P.2d 665; Mudd v. McClogan, 30 Cal.2d 463, 470, 183 P.2d 10; Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467. Since the supervisor has maintained a consistent administrative policy for many years, the oil industry in this state has undoubtedly relied upon that policy and expended substantial sums of money in the belief that the supervisor's interpretation of section

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[1] The supervisor could obtain a subsurface survey by exercise of his investigative powers under section 3357. That section, however, requires complicated legal proceedings after the supervisor suspects that a well has been drilled in violation of the code; section 3606 allows him to require a survey at the time he gives approval of the notice of intention to drill.

3600 is correct. Although failure to enforce statutes of this state will not estop a state agency from their subsequent enforcement, Caminetti v. State Mut. Life Ins. Co., 52 Cal.App.2d 321, 326, 126 P.2d 165; cf. People v. Ferguson, 134 Cal.App. 41, 53, 24 P.2d 965, past administrative action is evidence of the limits of the power to act, see Federal Trade Commission v. Bunte Brothers, 312 U.S. 349, 352, 61 S.Ct. 580, 85 L.Ed. 881; Pacific Tel. & Tel. Co. v. Public Utilities Comm., 34 Cal.2d 822, 831, 215 P.2d 441; 2 Sutherland, Statutory Construction [3d ed.] § 5106, particularly when a statute is reenacted without change in the light of a settled administrative interpretation. Mudd v. McColgan, supra, 30 Cal.2d 463, 471, 183 P.2d 10; Nelson v. Dean, supra, 27 Cal.2d 873, 882, 168 P.2d 16, 168 A.L.R. 467.

Richfield contends that defendants have shown only a "Mere failure to act," which is not enough to be an administrative interpretation, citing In re Estate of Madison, 26 Cal.2d 453, 463, 159 P.2d 630, 636. In the Madison case, however, the agency had not taken any steps from which the administrative interpretation of the statute could be discovered. In the present case the supervisor has continuously taken affirmative steps to carry out the policy of the oil spacing legislation, according to his interpretation. When the surface location of wells violates section 3600, or the producing interval violates section 3606, proceedings are set in motion to have the well abated as a public nuisance. When the surface location of a well is beyond 100 feet of an outer boundary no investigation is made regarding the producing interval. Thus the supervisor has consistently indicated that he interprets section 3600 as inapplicable to the subsurface location of oil wells.

Richfield contends that the supervisor's interpretation should not be given any weight on the ground that he is not charged with the duty of enforcing section 3600. If the supervisor discovers that an operator is violating the well spacing statute see sections 3203, 3210, 3214, 3236, 3357, 3606, he either requests the attorney general to seek an injunction or the district attorney of the particular county to prosecute the offender for commission of a misdemeanor. Penal Code § 372. Thus, in practice the supervisor determines which operators are subjected to legal proceedings for violation of the well spacing statute [2] and he has the power to obtain enforcement of section 3600 according to his interpretation thereof.

[5, 6] To support its interpretation of section 3600, Richfield points out that one of the purposes of the well spacing legislation is conservation of natural resources, relying on the declaration of purpose contained in the 1947 reenactment: "Unless this act takes effect immediately, wells will be drilled in violation of the policy of this State expressed in these sections for the conservation of natural resources and the observance of safe and orderly oil field operations upon the surface of the land and as a result of such violation large quantities of natural gas would be wasted to the air." Prevention of waste of oil and gas is undoubtedly a matter of public concern, and this court has repeatedly upheld the legislative power to prevent such waste. Hunter v. Justice's Court, 36 Cal.2d 315, 317–318, 223 P.2d 465, and cases cited therein. Richfield correctly asserts "that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation", Rock Creek etc. Dist. v. County of Calaveras, 29 Cal.2d 7, 9, 172 P.2d 863, but that rule of construction is not controlling here, for it is not shown that waste of oil and gas will result under the interpretation of section 3600 urged by defendants. Spacing of wells at the surface as required by sections 3600–3608 will limit the number of wells that may be drilled to the source of supply and will thus carry out the purpose of oil conservation.

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[2] For example, a recent decision of this court involving section 3608, Hunter v. Justice's Court, 36 Cal.2d 315, 223 P.2d 465, arose after the supervisor discovered an operator drilling a well in violation of the statute and asked the district attorney to prosecute him.

Had the Legislature intended section 3600 to apply to producing intervals, it would have been a simple matter to provide that a well's penetration of the producing formation must not vary from a vertical drawn from a properly placed surface location. Compare Fla.Stat.Ann. c. 377, § 377.26; No. Car. Gen.Stats. § 113–393D.

[7] For the foregoing reasons we have concluded that the statute applies only to the surface location of oil wells. The judgment in favor of defendants on Richfield's first cause of action must be affirmed, since Well 1 does not violate section 3600.

The Boundary Dispute

In its second cause of action, Richfield alleged that defendants had committed an underground trespass by drilling the producing interval of Well 1 under Richfield's property to the east of parcel four. At the trial Richfield and defendants differed as to the proper method of surveying the boundary between the properties involved. The trial court found that defendants' method was correct and that Well 1 was located entirely within parcel four.

At the time of the original lease from Russell, the owner of all the property involved in this litigation, to the Norris Oil Company in 1945, the property was described only by reference to northerly extensions of government section lines. The sublease of parcels one and four to Carpenter and Henderson in 1947 was based upon a reference to section numbers and was not described by metes and bounds.[3] In January, 1948, Norris subleased other portions of the property to Anderson Associates (Richfield's predecessor in interest) expressly excepting the Carpenter and Henderson lease by reference to government sections.

Subsequently, title companies refused to insure the location of the property on the ground that the descriptions were too uncertain. Russell, Norris, Richfield, and several sublessees entered into a boundary agreement on February 19, 1948, defining boundaries between the parties by reference to a base line, the southwest boundary of the Russell Ranch. Carpenter and Henderson were not parties to this agreement and it excepted their land, describing it by reference to government sections. On March 13, 1948, a number of sublessees executed a second boundary agreement, but, again, Carpenter and Henderson were not parties thereto.

On March 15, 1948, Carpenter and Henderson quitclaimed to Norris Oil Company all interest in the Norris lease except parcels one and four, describing these parcels by a legal description substantially identical with that used in the boundary agreements and describing the east boundary of the parcels as follows: "Beginning at a point * * * marked 'Cuyama Rancho C–No. 31' * * * thence N. 65° 10′ 24″ West along said SW line * * * a distance of 2,877.60 feet; thence due North 13,295.04 feet to true point of beginning. * * *"[4] On April 20, 1948, Norris Oil Company gave Carpenter and Henderson a new sublease for parcels one and four, again using this "due north" description of the east boundary. The "due north" description was used again on June 22, 1949, when parcel four was subleased to defendants by Carpenter and Henderson.

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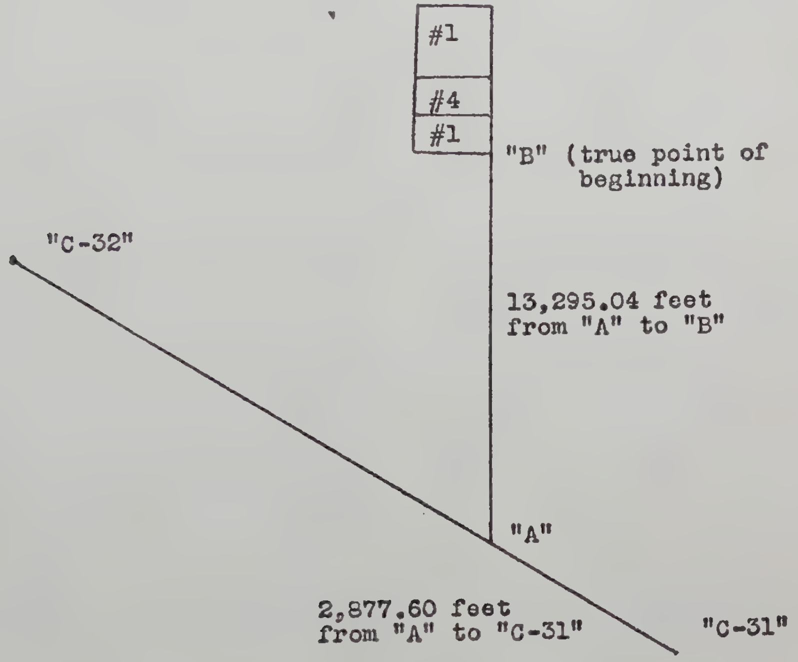
[3] The property was described: "The southeast quarter of the southeast quarter of Section 25, Township 11 North, Range 28 West; and the northeast quarter of the northeast quarter of Section 36, Township 11 North, Range 28 West; S.B.B. & M. The land described herein is unsurveyed and is based on a northerly extension of the southerly section lines; * * * and contains eighty acres, more or less."

[4] The full description provides: "Beginning at a point in the SW line of said Rancho at a 2-inch galvanized iron pipe 6-inches high in a mound of stones, brass-cap marked 'Cuyama Rancho C–No. 31', set by Gerald C. Fitzgerald, registered Civil Engineer, and shown on map recorded in Book 26, Pages 138 and 139 of Records of Surveys, Records of said Santa Barbara Co., thence N 65° 10′ 24″ West along said SW line as established by said Gerald C. Fitzgerald and shown on said Records of Survey map a distance of 2,877.60 feet; thence due North 13,295.04 feet to true point of beginning; thence due West 1320 feet; thence due North 2640 feet; thence due East 1320 feet; thence due South 2640 feet to the true point of beginning, and containing eighty acres, more or less."

The following diagram, not drawn to scale, indicates the property described by the "due north" terminology.

5 Thompson on Real Property, § 2824. Since the southwest line of the ranch did not actually have a bearing of 65° 10′ 24″ at point "A", the difference of the two surveys at point "B" was approximately 11 feet, east and west.


#1
#4
#1
"B" (true point of beginning)
"C-32"
13,295.04 feet from "A" to "B"
"A"
2,877.60 feet from "A" to "C-31"
"C-31"

Richfield surveyed the legal description of the property by running the line 2877.60 feet along the boundary of the ranch established by Fitzgerald (the line "C–31" to "C–32") to point "A", and then turning an angle of 65° 10′ 24″ on the transit at that point and surveying the line from "A" to "B", the true point of beginning for parcels one and four. This method, known as a basis of bearings survey, assumed for purposes of the survey that the southwest line of the ranch had a bearing of 65° 10′ 24″ at point "A". Defendants' survey used the same method as Richfield to find the location of point "A". At that point, however, they surveyed the call "thence due North 13,295.04 feet to true point of beginning" by running the line "true north" in the same manner as the township boundary would have been surveyed under the description in the original sublease, i. e. based on an observation of the North Star. See

The trial court permitted Richfield and defendants to present considerable extrinsic evidence regarding the proper method of surveying the "A" to "B" line. Substantial evidence supported the trial court's conclusion that defendants' method was correct. Dr. Thomas, a professor at the California Institute of Technology and president of the American Society of Civil Engineers in 1950, testified that good engineering practice required an astronomical observation to survey the "due north" call. Alfred Jones, chief engineer and surveyor of Los Angeles County for ten years, stated that ordinarily a "due north" call should be run as "true north." R. V. Pearsall, a licensed surveyor since 1913, agreed with Thomas and Jones. Richfield called several experts who testified that the description should be surveyed by a basis of bearings method. This testimony created a conflict in the evidence which was resolved in favor of defendants by the trier of fact.

[8, 9] The trial court properly admitted the extrinsic evidence. Surveyors and civil engineers, like other experts, may give testimony on questions involving matters of technical skill and experience with which they are peculiarly acquainted. Jenny Lind Co. v. Bower & Co., 11 Cal. 194, 197; Byard v. Hoelscher, 112 Conn. 5, 9, 151 A. 351; Dundalk Holding Co. v. Easter, Md., 73 A.2d 877, 879; Gutha v. Roscommon County Road Commission, 296 Mich. 600, 607, 296 N.W. 694; Zipf v. Dalgarn, 114 Ohio St. 291, 295, 151 N.E. 174; Pennington v. Mixon, 199 Ala. 74, 74 So. 238; Tacoma Bldg. & Savings Ass'n v. Clark, 8 Wash. 289, 36 P. 135; Burgess v. Healey, 73 Utah 316, 318, 273 P. 968; 7 Wigmore, Evidence [3d ed.], p. 87; 11 C.J.S., Boundaries, § 107, p. 703; contra: Edwards v. W. M. Ritter Lumber Co., 163 Va. 851, 857, 177 S.E. 841; Vaught v. McClymond, 116 Mont. 542, 555, 155 P.2d 612. The testimony is not accepted for the purpose of varying or contradicting the terms of the deed, but to aid the trial court in its difficult task of translating the words of the deed into monuments on the surface of the earth, in accord with accepted surveying practices. Thus, as early as 1858 this court held that surveyors could be examined on the question whether the professional practice in the community was to run a "north" call "true north" or "magnetic north", since without the extrinsic evidence the court could not determine the boundary indicated by the words of the deed. Jenny Lind Co. v. Bower, supra.

[10, 11] The findings of the trial court, based on the conflicting expert testimony and its interpretation of the deed, are consistent with the boundary description in the deed. Unless other terms of a deed or admissible extrinsic evidence show that a different method was intended by the parties, a "due north" call should be surveyed on an astronomical basis. Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 222, 183 P. 809; Fratt v. Woodward, 32 Cal. 219, 227; E. E. McCalla Co. v. Sleeper, 105 Cal.App. 562, 569, 288 P. 146; Gutha v. Roscommon County Road Commission, 296 Mich. 600, 607, 296 N.W. 694; Plaqueimines Oil & Development Co. v. State, 208 La. 425, 439, 23 So.2d 171. The base line was properly surveyed along the line from "C–31" to "C–32" and not by use of the 65°10′24″ bearing described in the deed, since the call to the known boundary line of the ranch prevailed over the call to its astronomical bearing. Wagnor v. Blume, 71 Cal.App.2d 94, 101, 161 P.2d 1001. There is no reason why the 65°10′24″ bearing, rejected in locating point "A", must as a matter of law be used in surveying the remaining calls in the description. Richfield points out that in many cases a "due north" or "north" call has been surveyed on other than an astronomical basis, see Currier v. Nelson, 96 Cal. 505, 508, 31 P. 531, 746; Martin v. Lloyd, 94 Cal. 195, 202, 29 P. 491; Faris v. Phelan, 39 Cal. 612, 613; Green v. Palmer, 68 Cal.App. 393, 401, 229 P. 876; Gutha v. Roscommon County Road Commission, supra, but in each of the cited cases other parts of the deed or the findings of the court based on admissible extrinsic evidence required a rejection of the astronomical method of surveying the call. In the present case, substantial evidence supports the finding of the trial court that defendants' method of survey was correct.

[12] The trial court admitted extrinsic evidence showing that by "due north" the parties to the boundary agreements meant that the call in the deeds should be surveyed only by a basis of bearings method. Richfield contends that this evidence requires reversal of the judgment, invoking another aspect of the parol evidence rule: that evidence of the circumstances surrounding execution of a written instrument is admissible to determine its meaning. Code Civ.Proc. § 1860. Carpenter and Henderson and defendants, however, were not parties to the boundary agreements, and it is not shown that they had actual notice that Richfield and Norris Oil Company attached a particular meaning to the words "due north." The conduct of Carpenter and Henderson indicates that they believed that the "due north" description in the March 15th quitclaim deed was interchangeable with the government sec-

tion description in the 1947 sublease. Although evidence of the negotiations preceding execution of the boundary agreements may be admissible as between the parties thereto, see Woodbine v. Van Horn, 29 Cal. 2d 95, 104, 173 P.2d 17; G. R. Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 296, 48 P.2d 669; Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 226, 41 P. 876, a special interpretation of the quitclaim deed could not be enforced against a party relying upon the words of the instrument and without knowledge of the meaning attached thereto by the other party to that deed. See Bennett v. Newell, 266 Mass. 127, 132, 165 N.E. 27; Dick v. Goldberg, 295 Ill. 86, 94, 128 N.E. 723; Attorney-General v. Shore, 11 Sim. 592, 631, 59 Eng. Rep. 1002, 1021; 9 Wigmore, Evidence [3d ed.], p. 207. Thus, in the present case the expert testimony of surveyors and engineers showing the proper method of surveying the calls in the deed was admissible as against both parties to the deed, since they must be deemed to know that "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate" Civil Code, § 1645, but evidence of the negotiations of the parties to the boundary agreements could not be admitted to the detriment of defendants, for it would be manifestly unjust to charge them with the secret interpretation of other parties after defendants had relied upon the ordinary meaning of the words of the instrument. See Davenport v. Davenport Foundation, 36 Cal.2d 67, 72, 222 P.2d 11; Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13.

Richfield next contends that defendants' survey results in disregarding the calls of the deed. Part of this argument is based on the fact that defendants disregard the 65°10′24″ bearing in determining the location of point "A" on the line from "C–31" to "C–32." Since Richfield locates point "A" by the same method as defendants, the argument is without merit. In the remainder of the survey, north from point "A" to point "B", and thence due west, due north, due east, and due south to point "B" again, it is clear that defendants' survey will describe a closed figure. Richfield and amicus curiae California Land Title Association assert that the interpretation adopted by the trial court and affirmed in this decision will cloud titles and upset settled boundaries throughout the state. These fears are groundless. Our decision does not add anything to rules of law established in California as early as 1858. Jenny Lind Co. v. Bower & Co. supra, 11 Cal. 194, 197.

[13] The judgment in favor of defendants on Richfield's second and third causes of action is correct, since there was no error in the trial court's determination that defendants' method of surveying the description in the deed was proper.

Richfield appealed from the judgment as a whole, but makes no contention that there is error in that part of the judgment in favor of plaintiffs in intervention Carpenter and Henderson.

GIBSON, C. J., SHENK, EDMONDS, CARTER and SPENCE, JJ., and VAN DYKE, Justice pro tem., concur.

114 Cal.App.2d 110

DUNNING et al. v. DUNNING et al.

DUNNING v. DUNNING.

Civ. 18993.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1952.

As Modified on Denial of Rehearing Nov. 24, 1952.

Divorced wife brought action to recover on terms of property settlement agreement to recover support and maintenance. The Superior Court of Los Angeles County, Thurmond Clarke, J., entered judgment in favor of divorced wife, and divorced husband appealed. The District Court of Appeal, White, P. J., held that incorporation of alimony provisions of agreement in divorce decree resulted in a merger of such provisions in the decree, so that such provisions could be enforced only by court order and not by action on the agreement.

Judgment modified.

1. Divorce ⚷255

Where provisions of property settlement agreement with reference to alimony payments to wife were actually incorporated in divorce decree, and decree ordered performance of such provisions, such provisions were merged in the decree and could be enforced only by order of the court, and divorced wife could not maintain an action against divorced husband to recover under the terms of the property settlement agreement for alimony payments.

2. Husband and Wife ⚷278(2)

Provision in property settlement agreement between husband and wife that no divorce decree should affect or supersede the agreement in any way, was in contravention of public policy in so far as it attempted to limit power of court in divorce suit over alimony and child support, and could not be upheld. Civ.Code, § 139.

3. Divorce ⚷245(1)

Obligation of divorced husband to pay alimony to divorced wife is a continuing obligation, subject at all times to scrutiny of courts as to fairness and adequacy from the beginning, and contract of parties cannot be permitted to deprive court of that power.

4. Divorce ⚷286

Where there was no conflict in the evidence, and controversy was submitted to trial court on stipulation of facts, there was no "issue of fact" involved, and it was duty of District Court of Appeal on appeal to make final determination in accordance with applicable principles of law as to whether certain provisions of property settlement agreement were incorporated and merged in divorce decree.

See publication Words and Phrases, for other judicial constructions and definitions of "Issue of Fact".

Covey & Covey, Hollywood, William Solomon, Los Angeles, for appellant.

John L. Mace, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff and respondent brought an action to recover upon the terms of a property settlement agreement providing for payment of money for the support of plaintiff and the minor children of plaintiff and defendant. The issue as to the support of the children having been settled by stipulation, this appeal concerns only the judgment for the plaintiff wife based upon support and maintenance provisions for her benefit contained in the property settlement agreement. The issue presented in the court below and on appeal is whether the contract provisions for periodic payments by the husband to the wife were superseded by their incorporation in the interlocutory judgment of divorce and hence unenforceable by an action upon the contract. The occasion for this action arises from the fact that the court in the divorce action by orders modifying the interlocutory judgment reduced the payments required of the husband to amounts substantially less than the stipulations of the contract.

From the agreed statement on appeal it appears that husband and wife, subsequent to the commencement of her action for divorce, had entered into a "property settlement agreement" which provided for the assignment of certain shares of stock and Treasury bonds to the wife and other shares of stock to the wife and each of the two children. With reference to payment of money to the wife, the agreement provided as follows:

"First Party (the husband) covenants and agrees to pay to Second Party for the support and maintenance of herself and of said minor children the sum of One Hundred Forty ($140.00) Dollars per week, * * *. In addition thereto, First Party shall secure and deliver to Second Party a lease (upon certain residential premises) * * *.

"Said payments shall continue during the life of Second Party and until she remarries a person other than First Party.

"If Second Party shall remarry a person other than First Party, First Party shall thereafter pay to Second Party for the support and maintenance of each of said minor children the sum of Forty-six and 66/100 ($46.66) Dollars each per week, payable weekly so long as each such child is a minor.

"First Party covenants and agrees to pay to Second Party in addition to the amounts hereinabove agreed to be paid for the support and maintenance of Second Party and said minor children, forty per cent (40%) of his annual net income (as defined and computed under the Federal Income Tax Rules and Regulations) from all sources in excess of the sum of Thirteen Thousand ($13,000.00) Dollars, before deduction for income taxes, social security, and unemployment insurance. * * *."

"Said payments shall continue during the life of Second Party and until she shall remarry, and shall likewise continue after the remarriage of Second party for the benefit of said minor children until both of said children shall have attained their majority."

The parties further agreed as follows: "If at any time either of the parties to this agreement shall seek or obtain a divorce or legal separation from the other, this agreement shall still remain in full force and effect. Either party may have this agreement *made a part* of any divorce or separation decree made by any court of competent jurisdiction, *provided, however, that any such decree shall not affect or supersede this agreement in any way.*" (Emphasis added.)

Again referring to the agreed statement, it appears that an interlocutory judgment of divorce (by default) in favor of the wife was entered on April 11, 1950, approximately one month after the execution of the agreement. The transcript of the testimony at the default hearing discloses the following:

> "Mr. Mace (Counsel for plaintiff): We would like to offer a copy (of the agreement), your Honor; we are not asking for it to be approved.
>
> "The Court: Well, if you are not asking for its approval, why—
>
> "Mr. Mace: But we are incorporating its terms in the interlocutory decree.
>
> * * * * * *
>
> "The Court: All right, the original will be received as Plaintiff's Exhibit 1; a copy thereof will be substituted, * * *
>
> "The Court: Counsel, the decree here is very lengthy. I should want to check it against the property settlement agreement.
>
> "Mr. Mace: Yes, your Honor."

By its interlocutory judgment of divorce the court did not approve the property settlement agreement, nor did it state that it "was made a part" of the interlocutory judgment. However, in addition to other provisions, the interlocutory judgment contained directions for payments by the husband in precisely the language employed in the agreement and which language has been hereinabove quoted. Appellant contends that the foregoing decree presents a situation in which an agreement for the payment of sums for support and maintenance has been incorporated in and superseded by a judgment of the superior court, Hough v. Hough, 26 Cal.2d 605, 609, 610, 160 P.2d 15, and under the authority of the cited case no action may be maintained upon that portion of the agreement which has been superseded by the judgment, the remedy of the complaining party being upon the judgment and not upon the contract.

The respondent contends, however, that the agreement was not incorporated in the interlocutory judgment, in that it was not presented for approval and was not approved; that the trial court in the divorce action considered the agreement only as evidence of what would constitute a reasonable sum for alimony and child support; that the record discloses that the court did not intend to incorporate the agreement in the interlocutory judgment; that the appellant waived this defense to an action on the contract; and that an appellate court is bound by the findings of the court below in the absence of a showing that such findings are not supported by substantial evidence.

[1] We are satisfied that in the instant case the provisions of the agreement with reference to alimony payments (paragraphs 4 and 5) to respondent wife were actually

incorporated in the decree and that the decree orders the performance of such provisions. Therefore, the provisions so incorporated are merged in the decree and may be enforced only as the order of the court, Lazar v. Superior Court, 16 Cal.2d 617, 620, 107 P.2d 249; Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15; Shogren v. Superior Court, 93 Cal.App.2d 356, 209 P.2d 108.

That respondent fully intended to incorporate the terms of the agreement in the interlocutory decree is evidenced by the language of her counsel (heretofore quoted) at the trial. From such language it must necessarily be assumed that respondent, in asking the court to incorporate the alimony provisions of the agreement in the decree, was desirous of securing for herself the right to seek enforcement of such provisions by proceedings on the decree, including such aids as execution, contempt and other process of the court, together with an action on the decree. Respondent could have preserved her right to sue under the contract if paragraphs 4 and 5 thereof were not incorporated in the decree and not made a part thereof.

Respondent next contends that by the terms of paragraph 16 of the property settlement agreement, which provides in part that "Either party may have this agreement made a part of any divorce or separation decree made by any court of competent jurisdiction, *provided, however, that any such decree shall not affect or supersede this agreement in any way*" (emphasis added), appellant waived his right to defend in the instant action upon the ground of incorporation and merger of said provisions of the agreement in the decree.

[2] Whatever may be said of the efficacy of such a waiver so far as agreements between husband and wife regarding property and property rights are concerned, we are satisfied that any such agreement between the parties attempting to limit the power of the court over alimony and child support, Civ.Code, § 139, would contravene public policy and cannot be upheld. As was said by our Supreme Court in Hough v. Hough, supra, 26 Cal.2d at page 612, 160 P.2d at page 18, "The settlement of property rights should be final in order to secure stability of titles. Support allowances on the other hand should be subject to the discretion of the court as justice may require. It may well be reasoned that the provision of section 139 of the Civil Code authorizing the modification of support allowances becomes an implied part of the agreement when it is incorporated into the decree".

[3] The obligation to pay alimony is a continuing one, subject at all times to the scrutiny of the courts as to fairness and adequacy from the beginning, and the contract of the parties cannot be permitted to deprive the court of power which it otherwise possesses.

[4] Respondent's contention that the trial court's finding that the property settlement agreement was not presented to the court at the trial for approval, was not approved by it, and was not incorporated in the decree, cannot be disturbed on appeal if reasonably supported by the record, even though a contrary finding might be equally tenable, cannot be sustained. The rule relied upon by respondent has no application to the case now engaging our attention. There is no conflict in the evidence. The controversy was submitted to the trial court upon a stipulation of facts. Under the circumstances here presented, there is no issue of fact, and it is the duty of an appellate court to make the final determination, in accordance with the applicable principles of law, as to whether paragraphs 4 and 5 of the property settlement agreement were or were not incorporated and merged in the interlocutory judgment of divorce, Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825.

For the foregoing reasons, the judgment appealed from is modified by striking therefrom the provisions of paragraph 3, providing for the recovery of $900 and interest from the defendant, and inserting in lieu thereof a provision that plaintiff take nothing from defendant by her second cause of action. Appellant to recover costs on appeal.

DORAN and DRAPEAU, JJ., concur.

114 Cal.App.2d 64

TOWNSEND v. WINGLER et al.

Civ. 19098.

District Court of Appeal, Second District,
Division 2, California.
Nov. 7, 1952.

Grantor's suit for reconveyance and an accounting, wherein issue was whether conveyance of property had been absolute or as security for a loan. The Superior Court, Los Angeles County, William M. MacMillan, J., rendered judgment in favor of defendants, and plaintiff appealed. The District Court of Appeal, Fox, J., held inter alia, that the findings supported the judgment.

Affirmed.

1. Mortgages 🔑36

Presumption is that a deed is what it purports to be, and one who seeks to overcome such presumption has burden of producing clear and convincing proof.

2. Appeal and Error 🔑1011(1)

Whether evidence offered to change ostensible character of instrument is clear and convincing is a question for trial court, and its determination in favor of either party, upon conflicting or contradictory evidence, is not open to review on appeal.

3. Mortgages 🔑38(1)

Evidence would not sustain grantor's contention that conveyance had not been absolute but merely as security for a loan. Civ.Code, §§ 2924, 2925.

4. Contracts 🔑99(1)

Relationship of parent and child is not, per se, creative of any inference of imposition, undue influence or fraud, and advanced age of parent at time of transaction is not alone sufficient to raise such inference or presumption.

5. Deeds 🔑196(2, 3, 4)

In grantor's suit to require reconveyance, burden was upon him to show, as fact, that deeds he prepared and executed, and contract he prepared and signed, were induced through fraud, undue influence, or coercion on part of defendants, as contended.

6. Deeds 🔑211(3, 4, 5)

Evidence would not sustain grantor's contention that deed had been product of undue influence, fraud, or coercion.

7. Appeal and Error 🔑171(1)

Ordinarily an appellate court will not consider a theory of a case different from that relied on in trial court and which is presented for the first time on appeal.

8. Judgment 🔑527

All findings should be read together and so construed as to uphold rather than defeat judgment, and to that end the findings are to be liberally construed and any inconsistency therein is to be resolved, if reasonably possible, in favor of sustaining judgment.

9. Mortgages 🔑608½

In grantor's suit for reconveyance, involving issue as to whether conveyance had been absolute or as security for loan, findings supported judgment for defendants and were not subject to claimed infirmities of inconsistency or contradiction.

◆

Stanley M. Evans, Los Angeles, for appellant.

Gordon Stater, Los Angeles, for respondents.

FOX, Justice.

Plaintiff brought this action against his daughter and her husband alleging that in July, 1948, he conveyed two parcels of real property and assigned a trust deed note to her as collateral security for loans to him aggregating "about $10,000," which he alleged had been repaid to her out of the proceeds from the collateral. Plaintiff demanded a reconveyance of the property and an accounting.

Defendants denied the property was conveyed as collateral security for any loan. They affirmatively alleged the conveyances were for a good and valuable consideration, and that plaintiff had no interest in the property; that the property was conveyed pursuant to a written agreement between plaintiff and his daughter (which was approved by her husband) whereby defendants agreed to provide funds for plaintiff to carry on certain litigation in which he was then engaged and for other purposes, and to pay plaintiff $100 per month for ten years, or the balance of his life, whichever was longer; that pursuant to this agreement they had paid to plaintiff, or for his benefit, more than $16,000, and had provided him with funds and benefits in excess of $100 per month. They further state that they have at all times complied with said agreement and have never denied their obligation thereunder, and that plaintiff has received and accepted, and continues to accept, all the benefits under the agreement.

The court resolved the issues in favor of the defendants and rendered judgment that plaintiff take nothing. He appeals from the judgment.

[1–3] Plaintiff challenges the sufficiency of the evidence to sustain the findings and judgment. His contention, however, is not well founded. The burden of showing that these conveyances were mortgages was upon him. Wehle v. Price, 202 Cal. 394, 396, 260 P. 878; Deniz v. Ferraiz, 91 Cal.App. 2d 416, 418, 205 P.2d 113; Gronenschild v. Ritzenthaler, 81 Cal.App.2d 138, 144, 183 P.2d 720. "The presumption is that a deed is what it purports to be and one who seeks to overcome such presumption has the burden of producing clear and convincing proof." Spataro v. Domenico, 96 Cal.App. 2d 411, 413, 216 P.2d 32, 33; Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583. "Whether the evidence offered to change the ostensible character of an instrument is clear and convincing is a question for the trial court and its determination in favor of either party upon conflicting or contradictory evidence is not open to review on appeal." Spataro v. Domenico, supra; Beeler v. American Trust Co., supra; Baines v. Zuieback, 84 Cal.App.2d 483, 488, 191 P.2d 67. Here plaintiff sought, principally by various conversations, to establish that these deeds did not convey an absolute title but were in fact given as and understood to be security for certain loans. The defendants deny any loan, security or mortgage arrangements with respect to the conveyances. They produced a written agreement which plaintiff, an attorney in this state for many years, had prepared, and which was signed by him and his daughter and approved by her husband, which set forth the terms of their agreement. This document contains no suggestion that the property was to be conveyed as security or that plaintiff retained any interest in it. In weighing the evidence and resolving the conflict the trial court was entitled to consider the fact that at a previous hearing on supplemental proceedings by a judgment creditor plaintiff testified that he had no equity or interest in these properties. The determination by the trial court of this factual question adversely to plaintiff is binding on this court. Spataro v. Domenico, supra.

[4–7] In his brief in this court plaintiff for the first time seeks to attack the transaction on the grounds of undue influence, fraud and coercion. He argues that there is a presumption that the deeds and the contract between him and his daughter are vitiated upon these grounds and that the burden was upon defendants to establish they were free from such taint. The relationship of parent and child, per se, is not creative of any inference of imposition, undue influence or fraud. Jorgensen v. Dahlstrom, 53 Cal.App.2d 322, 333, 127 P.2d 551; Best v. Paul, 101 Cal.App. 497, 499, 281 P. 1089; Carleton v. Bonham, 60 Cal.App. 725, 738, 214 P. 503; 20 Cal.Jur., p. 443, sec. 41. It is suggested that such an inference arises by reason of the fact that plaintiff was past 70 years of age when these transactions took place. This is not true. Even the advanced age of a grantor is not alone sufficient to raise such an inference or presumption. Soberanes v. Soberanes, 97 Cal. 140, 146, 31 P. 910; Johnson v. Studley, 80 Cal.App. 538, 559, 252 P. 638; Best v. Paul, supra. The burden was upon plaintiff to show, as a fact, that the deeds he prepared and executed, and the contract he prepared and signed, were induced through fraud, undue influence, or coercion on the part of defendants. Carleton v. Bonham, supra, 60 Cal.App. 739, 214 P. 508, 509; Jorgensen v. Dahlstrom, supra. This he failed to do. He did not raise any such questions by his pleadings. He simply alleged that the deeds were "delivered to defendant [his daughter] as collateral security for cash loans from her to him aggregating about $10,000." Furthermore, during the trial plaintiff, who represented himself, did not suggest any such theory. He told the court he relied on Civil Code sections 2924 and 2925.[1] He read these sections to the court and referred to them on seven different occasions during the course of the trial. To permit him now to change his position and adopt a different theory on appeal would be manifestly unfair to the defendants. 2 Cal.Jur., p. 237. Ordinarily an appellate court will not consider a theory of a case different from that relied on in the trial court and which is presented for the first time on appeal. Grimes v. Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934; Blanc v. Connor, 167 Cal. 719, 726, 141 P. 217; Martin v. Diaz, 124 Cal.App. 200, 205, 12 P.2d 57; White v. City of San Diego, 126 Cal.App. 501, 507, 14 P.2d 1062; Rohl v. Van Cleve, 90 Cal. App.2d 317, 321, 202 P.2d 807.

[8, 9] There is no merit in plaintiff's contention that the findings are inconsistent and contradictory. The real issue was whether the conveyance of the property was absolute or as security for a loan. On this issue the court found that "the conveyance * * * was not made as a mortgage and there was not a loan transaction between plaintiff and either of said defendants in connection with any of the matters * * * alleged in the complaint and plaintiff has no equity in, or redemption rights to said property, * * * and said conveyances * * * were absolute and without any restriction or conditions, or collateral loan agreement." This finding is both clear and specific, and supports the judgment. "It is an established rule that all the findings should be read together and so construed as to uphold rather than defeat the judgment, and to that end the findings are to be liberally construed and any inconsistency therein is to be resolved, if reasonably possible, in favor of sustaining the judgment." Davis v. Stulman, 72 Cal.App.2d 255, 262, 164 P.2d 787, 791. Reading the findings in the light of these principles it cannot be said that there is serious or substantial inconsistency or contradiction therein.

There was no prejudicial error in the admission or exclusion of evidence, or in the other rulings of the trial court.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

114 Cal.App.2d 128

LYNCH v. DEFINO.

Civ. 19080.

District Court of Appeal, Second District,
Division 3, California.
Nov. 10, 1952.

Action by police officer for injuries sustained when his motorcycle went out of control when attempting to avoid collision at intersection with defendant's automobile, while officer was pursuing speeder. The Superior Court of Los Angeles County, Joseph Marchetti, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that unavoidable accident instruction was not precluded on ground that defendant had been negligent as matter of law, since that evidence would have warranted finding that accident happened without negligence on part of either party.

Affirmed.

1. Appeal and Error 🔑1046(1)

Where police officer brought action for personal injuries sustained in fall with motorcycle when attempting to avoid collision with defendant's automobile, and defendant introduced, for purposes of impeachment, statement made by officer to police sergeant at hospital, denial of plaintiff's motion for recess from Thursday until Monday in order that police sergeant might be examined to show what actually happened at hospital was not prejudicial error when there was no showing of why plaintiff's counsel, in exercise of diligence, had not previously discovered statement on police records, and no showing as to whether sergeant's testimony would be favorable or unfavorable.

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[1] The pertinent portion of section 2924 reads as follows: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, * * *."

Section 2925 reads: "The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser on encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument."

2. Appeal and Error ⚷1046(5)

In action by police officer for personal injuries sustained in fall when his motorcycle went out of control when attempting to avoid collision with defendant's automobile which was making left turn at intersection, wherein officer's witness had testified as to location of defendant's automobile when witness first observed it, and defendant's counsel, on cross-examination, restated substance of witness's testimony in propounding query, and objection was taken that restatement was misstatement of evidence, it was not prejudicial error for court to inform plaintiff's counsel that he did not believe there had been misstatement, and to examine witness for purpose of fully clarifying the matter.

3. Appeal and Error ⚷1048(1)

In action for personal injuries to police officer when his motorcycle went out of control when he attempted to avoid collision with defendant's automobile wherein defendant's witness had testified, concerning contradictory statement made by officer to police sergeant at hospital, and plaintiff's counsel objected to testimony on ground that statement should be put in evidence, and objection was accompanied by admission of plaintiff's counsel that he had gone far afield in his cross-examination, statement of trial judge which in effect told plaintiff that defendant should not be limited in his examination because plaintiff had not been so limited was not prejudicial error.

4. Automobiles ⚷246(57)

In action for personal injuries to police officer when his motorcycle went out of control while attempting to avoid collision with defendant's automobile which was making left turn at intersection, evidence would have warranted jury's finding that accident happened without negligence on part of either party, and giving of unavoidable accident instruction was consequently not error on ground that defendant was negligent as matter of law.

5. Negligence ⚷63

The term "unavoidable accident" signifies an injury which is caused by something other than the actionable negligence of the parties involved.

See publication Words and Phrases, for other judicial constructions and definitions of "Unavoidable Accident".

Arthur Strock, Los Angeles, and A. Stewart Maddox, Jr., Beverly Hills, for appellant.

Parker, Stanbury, Reese & McGee and R. S. Harrington, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant entered on a verdict of a jury in an action for damages for personal injuries.

Plaintiff, a motorcycle officer, in pursuit of a suspected traffic violator, in broad daylight, was northbound on his motorcycle on Lankershim Boulevard in Los Angeles. Defendant, southbound in an automobile, was making a left turn at the intersection of Oxnard Street. Plaintiff's motorcycle went down in the intersection, and he was injured. Apparently he was attempting to avoid a collision with defendant's automobile.

The specifications of error are 1) the trial judge erred and deprived plaintiff of a fair trial, and the appearance of a fair trial, by not allowing him to introduce evidence to refute evidence introduced by defendant for the purpose of impeaching plaintiff;

2) the trial judge committed prejudicial error by inaccurately restating evidence to the jury, and by accusing plaintiff's counsel in the presence of the jury of distorting testimony, which accusation was without foundation in fact or any other justification; 3) the trial judge committed prejudicial error by inaccurately accusing plaintiff's counsel of delaying the progress of the trial; 4) the court erred in giving an instruction on unavoidable accident.

[1] 1. Plaintiff was a witness in his own behalf. On cross-examination, defendant's counsel sought to impeach him by a statement he had made to Sergeant Cudlip, a police officer, at a hospital the evening of the accident. The statement was in the form of a report called "Sick and Injury Report," signed by plaintiff, and had been on file with the police department from the time it was taken. When plaintiff had completed his case, his counsel asked the court: "May I rest, sir, at this time subject to my right to call Officer Cudlip or make appropriate motions as to the testimony which has already been introduced on behalf of the defendant? The Court: Yes." When defendant rested on a Thursday, counsel for plaintiff asked the court "for a recess until Monday morning so that I can put on Sergeant Cudlip to know what actually happened in that hospital." The motion was denied. However, the cause was continued to the following Monday, at which time counsel for plaintiff did not make any further reference to Sergeant Cudlip, plaintiff testified briefly, and the cause was argued.

Error is assigned in the denial of the motion for a recess from Thursday to Monday so plaintiff could "put on Sergeant Cudlip." There was no prejudicial error. The complaint was filed on June 15, 1950. The trial began October 9, 1951. There was no showing of diligence. No showing was made as to why plaintiff's counsel, in the preparation of his case, had not discovered the existence of the "Sick and Injury Report" which showed on its face that it had been taken by Sergeant Cudlip. Its contents and the name of Sergeant Cudlip were included in the regular "Accident Investigation Report" which were on file with the police department. No showing was made as to why plaintiff's counsel had not examined the "Accident Investigation Report" before the trial. No showing was made as to why plaintiff's counsel had not discovered that Sergeant Cudlip might be a material witness and placed him under subpoena. No indication was made to the court with respect to what plaintiff expected to prove by Sergeant Cudlip except "to know what actually happened in that hospital." It is obvious plaintiff's counsel had no knowledge as to whether Sergeant Cudlip's testimony would be favorable or unfavorable.

[2] 2. A witness called by plaintiff testified on direct examination that at the moment the motorcycle went by him, he saw defendant's automobile "just leaving the intersection, or it was about in my lane of traffic." On cross-examination the following occurred:

"Q. In answer to Mr. Strock's question, I think you told us, you said first that when the motorcycle came by you on your right side, at the very moment it passed you, you first said that Miss Defino's car was in the crosswalk, and then you said 'no, I think perhaps in my lane of traffic.' Do you recall saying that in substance? A. Yes.

"Mr. Strock: [Attorney for plaintiff] I beg pardon; that is a misstatement of the evidence.

"The Court: The witness testified; he said it was true.

"Mr. Strock: I object to that on the ground he put that in his mouth, as to what he desired, by improper cross-examination. The testimony was that she was getting out of the intersection. The crosswalk was not in his testimony.

"The Court: I will say it was. You immediately picked him up and had him in a different position. But the beginning of his testimony was that it was in the crosswalk. I will ask him that question.

"Q. When you first observed the defendant's car, was it in the crosswalk or in the intersection, or half and half, or how? A. When I first observed it?

"Q. Yes. A. It was setting still at the middle of the intersection.

"Q. When you saw it pass, was it in the intersection? A. As the officer passed me?

"Q. Yes. A. She was directly in front of me and the officer.

"Q. What with regard to the intersection? A. I would say she wasn't out of the intersection. She hadn't started across the crosswalk yet.

"Q. Was she in the crosswalk? A. No, sir."

The argument is that the trial judge incorrectly informed plaintiff's counsel, in the presence of the jury, that he deliberately caused a witness to change his testimony to plaintiff's prejudice. The point is trivial. The witness, in response to a proper leading question on cross-examination, testified that defendant's automobile was in the crosswalk at the moment in question. When plaintiff's counsel questioned the fact, the court took over, and the matter was fully clarified.

[3] 3. A witness for defendant testified briefly relative to the "Sick and Injury Report." Plaintiff's counsel cross-examined the witness on matters which were not particularly material. On redirect examination, the following occurred: "Mr. Strock: [Attorney for plaintiff] Just a minute. This [the report] has been secondary evidence for quite a while. He should put it in evidence rather than having this man tell us what is on it. I have somewhat fallen into the same error. The objection would have been good to my questions too.

"The Court: What are your objections:

"Mr. Strock: I object to this man telling us what's on it. Let's put it in evidence. If he wants it in evidence, and let the jury see it.

"The Court: I don't think we should limit him. If we had limited you to that this case would have been over two days ago, or a day ago. Go ahead."

The error assigned is that the comments of the trial judge were prejudicial. The point is farfetched and trivial. Counsel admitted he went far afield in his cross-examination. He cannot complain because the trial judge told him that defendant should not be limited in his examination since he had not been limited.

[4, 5] 4. The court gave an instruction on unavoidable accident. Plaintiff assigns error. In Parker v. Womack, 37 Cal.2d 116, at pages 121–122, 230 P.2d 823, at page 826, the court said: "Upon a record which includes affirmative evidence tending to prove an accident proximately caused by circumstances beyond the control of an ordinarily prudent person, an instruction upon unavoidable accident has been held proper. * * * An instruction stating the law regarding the right of a defendant from exemption from liability because the accident could not have been avoided has also been approved where there was no evidence that it was caused by any factor other than the lack of care. In Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485, and Scandalis v. Jenney, 132 Cal.App. 307, 22 P.2d 545, it was held that the giving of an instruction concerning the rule of unavoidable accident was prejudicially erroneous. However, in each of these cases, the evidence established the negligence of the defendant as a matter of law. Under the evidence there was no question of negligence for the jury to decide."

Plaintiff argues that defendant was negligent as a matter of law, and that, therefore, it was error to give the instruction. Defendant entered the intersection with the green light and came to a stop while yielding to opposite bound traffic. She made a proper signal for a left turn. After she started the turn, the lights changed to "caution," and then to "stop" for north-and-southbound traffic on Lankershim. She proceeded slowly at 10 to 13 miles an hour while turning, and was about at the crosswalk when she heard the siren of the northbound motorcycle. The motorcycle passed behind her. There was no contact between the vehicles. Plaintiff was travelling from 40 to 45 miles an hour, and ran the red light with his siren on. He applied his brakes, and the motorcycle skidded out of control. Defendant's view of the motorcycle, as she was making her turn, was obscured by several automobiles which had stopped at the south edge of the intersection in obedience to the red light. One of plaintiff's witnesses heard the siren four seconds before the accident. The jury could have inferred from plaintiff's statement to Sergeant Cudlip that he turned his siren on 2½ seconds before he entered the intersection.

The state of the evidence was such that the jury could have found that the accident happened without negligence on the part of either party, and that the real cause of the accident was the skidding of plaintiff's motorcycle. The rule stated in Parker v. Womack, supra, 37 Cal.2d 116, 230 P.2d 823, is applicable. The court stated, 37 Cal.2d at page 120, 230 P.2d at page 825: "The terms inevitable or unavoidable accident signify an injury which is caused by something other than the actionable negligence of the parties involved. * * * Otherwise stated, and incorporating both factors which relieve one from liability [absence of failure to use ordinary care or extraordinary care, where not demanded], an accident is inevitable or unavoidable when it is not proximately caused by negligence."

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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114 Cal.App.2d Supp. 834

CREDIT BUREAU OF SAN DIEGO, Inc. v. SMALLEN.

No. 173313.

Appellate Department, Superior Court, San Diego County, California.

Sept. 19, 1952.

Action for a balance alleged to be due on an amount loaned to defendant by plaintiff's assignor. From a judgment of the Municipal Court, City of San Diego, Philip Smith, J., for defendant, plaintiff appealed. The Superior Court, Appellate Department, Burch, J., held that the evidence supported the trial court's finding that the amount loaned was fully repaid by defendant before commencement of the action.

Judgment affirmed.

1. Payment 🔑73(1)

In action for alleged balance due on amount loaned defendant by plaintiff's assignor, evidence supported trial court's finding that such amount was fully repaid to plaintiff by defendant before commencement of action.

2. Witnesses 🔑219(2)

A spouse relying on contract between spouses waives statutory privilege that neither spouse may testify to communications between them without other spouse's consent so far as communications respecting such contract are concerned. Code Civ.Proc. § 1881, subd. 1.

3. Witnesses 🔑219(2)

In action for alleged balance due on amount loaned defendant by plaintiff's assignor, plaintiff, by raising issue as to nature of contract of assignor and his wife with defendant for such loan, opened door for consideration of contract in its entirety, including any amendments or novations, and waived statutory privilege against spouse testifying as to communications between spouses without other spouse's consent, so that wife's testimony as to assignor's consent to modification of contract was properly admitted. Code Civ.Proc. § 1881, subd. 1.

4. Witnesses 🔑188(1)

The statute prohibiting examination of husband or wife as witness for or against the other concerning communications between them during marriage without other spouse's consent cannot be used as instrument to prevent justice or to permit husband to initiate litigation which can succeed only by silencing wife. Code Civ. Proc. § 1881, subd. 1.

◆

Ruel Liggett, Roy M. Cleator and E. C. Davis, San Diego, for appellant.

Ray Miller, San Diego, for respondent.

BURCH, Judge.

Plaintiff sues for $1781.25 as the unpaid balance of $1900.00 loaned to defendant, George Smallen, by plaintiff's assignor, Frank Charles Szehner, Jr. Defendant admits the loan and defends upon the ground that it was fully repaid.

Frank Charles Szehner, Jr. and Aileen Szehner were husband and wife. Aileen is defendant's sister. Frank Charles Szehner, Jr. was a Chief Petty Officer in the United States Navy in September, 1948. About that time, he received naval orders to proceed to Honolulu for a tour of duty expected to extend over a period of two years. A family conference was had, at which Szehner and his wife, Smallen, the defendant, and Mrs. Mabel Smallen, mother of Aileen and George, were present. At this conference, it was mutually arranged between the Szehners on their part that they would lend George Smallen $1900.00, and that if and when Smallen would accumulate funds toward the repayment of this loan, he would invest the same in United States Series E bonds in the name of himself, Szehner and his wife, Aileen, but retain the bonds in his possession, to be used to defray the expenses of an expected major operation of the then invalid mother of Aileen and George. By the terms of the arrangement, the bonds could be cashed by Smallen at any time and the proceeds used by him should the necessity arise.

Pursuant to this arrangement, Szehner purchaser a bank cashier's check in the amount of $1900.00 payable to Smallen, which was paid for by funds from the joint account of himself and his wife, Aileen. Smallen received the check in January, 1948. Shortly after the Szehners arrived in Honolulu, Smallen discovered that regulations for the issuance of United States Series E bonds would not permit their purchase in the names of more than two persons as joint owners, whereupon he testified that he promptly wrote the Szehners in Honolulu informing them that this was the case, stating that he had commenced the purchase of the bonds in the names of himself and his sister, Aileen Szehner, only and asking if this would be all right. Mrs. Szehner replied, agreeing for the Szehners to the purchase of the bonds in these names. He continued his purchases in this manner until he had acquired bonds in the names of himself and sister of the cash value of $1781.25, at the time the Szehners returned to California about the first of March, 1950. We quote from the Settled Statement on Appeal:

> "That in the latter part of March or about the first of April, 1950, Frank Szehner and his wife, who were then living together as husband and wife at Escondido, California, discussed the advisability of securing the bonds from Smallen in order to pay for a new Ford automobile. As a result of this discussion Szehner thereupon directed his wife to go to Smallen and secure the bonds from him, which she did. Szehner denied having at any time authorized his wife to receive the bonds from Smallen. At that time Mrs. Szehner, intending to divorce her husband, had no intention of turning the bonds over to her husband, but told Szehner Smallen had delivered the bonds to her. She did not, however, then disclose her intention to divorce her husband either to her husband or to Smallen, telling her brother simply that her husband had asked her to get the bonds. Smallen told her that they were at the bank and that he would give them to her the next day, which he did. The bonds he then *deliver* to her were of the cash value of $1781.25. Szehner testified that a few days thereafter he asked Smallen for the bonds, who informed him that he had previously delivered them to Aileen, and that the difference between $1781.25 and the $1900.00 loan, to-wit, the sum of $118.75 he would pay in cash. It is not denied that Smallen did this the following day by depositing that sum in the Escondido bank account of Szehner and his wife. Szehner thereupon closed the account receiving the fund, subsequently establishing a bank account in his own name at Coronado.
>
> * * * * * *
>
> "That none of the bonds delivered by Smallen to Mrs. Szehner were ever delivered by her to her husband nor did she deliver any of the proceeds of the sale of such bonds to her husband. At the time of the delivery of the bonds by Smallen to his sister the

> Szehners were having domestic difficulties but were living together as husband and wife. The Szehners' first separation occurred about a month subsequent to Smallen's delivery of the bonds to Aileen Szehner. * * *"

An interlocutory decree of divorce was granted to Mrs. Szehner on October 31, 1950, and a final decree on November 1, 1951. The divorce action was commenced on the 14th of April, 1950. At that time, Mr. Szehner alleged in his complaint:

> "'That the parties own community property consisting of real estate improved with a small dwelling house, household furniture, and approximately $4,000.00 in United States Savings Bonds; that the defendant wife of plaintiff has placed said Savings Bonds in the safety deposit box in her name; that plaintiff is informed and believes, therefore alleges, that said safety deposit box is located at the Escondido Branch of the Bank of America, * * *.'"

Mr. Szehner testified as follows:

> "Q. Now, this $4,000.00 in bonds comprised what? The four thousand that you referred to in that paragraph? A. It comprised what her brother said that he gave her.
>
> "Q. And you, together with the other bonds that you had? A. The family savings.
>
> * * * * * *
>
> "Q. * * * You intend us now to believe that this $4,000.00 in bonds that you refer to as community property included the $1900.00 that had been paid for from George Smallen to your wife. * * *?
>
> * * * * * *
>
> "A. Yes."

To the subsequent action filed by Mrs. Szehner, Mr. Szehner filed an answer and cross complaint, and alleged, among other things:

> "'* * * that the plaintiff has truthfully set forth all the community property of the parties hereto, alleges the fact to be that plaintiff has in her possession approximately $5,000.00 United States Government Bonds and that plaintiff herein will dispose of said bonds unless she is restrained by the court from so doing.'"

There was further read into evidence an affidavit by Mr. Szehner's former attorney in the divorce action, in which it is alleged on information and belief:

> "Q. * * * that Eileen Szehner, plaintiff herein, has in her possession, United States Government Bonds purchased during the married life of the parties herein, together with United States Bonds purchased * * * in the name of the minor child to the parties hereto and or any other bonds in the name of plaintiff and or the defendant herein, * * *."

The Court found that defendant became indebted to Frank Charles Szehner, Jr., plaintiff's assignor, in the sum of $1900.00 for and on account of money loaned said defendant, without interest, at defendant's special instance and request; that it is true that from March of 1948 until on or about the first of March, 1950, plaintiff's assignor was an enlisted man in the United States Navy, stationed outside of the territorial limits of the United States; but it is not true that the said account of $1900.00 for money loaned had not been paid, but on the contrary the Court finds that it is true that said loan was fully paid and discharged during the month of April, 1950, and prior to the commencement of this action. Judgment was accordingly entered for the defendant.

[1] We think the evidence supports a finding that the loan was repaid. It is clear from the record that the full benefits of the repayment were accepted and acted upon by Frank Charles Szehner, Jr., in the divorce action, and in that action he received the benefits of the fund as repaid.

During the course of the trial, the wife testified that upon their receipt in Honolulu of the letter written by the defendant advising them of the necessity of buying the bonds in only two names, her husband, Frank Charles Szehner, Jr., told her to express to her brother Szehner's satisfaction with the new arrangement. At the time this evidence was elicited, Mrs. Szehner had testified on direct examination:

> "A. * * * my husband and I received a letter from my brother saying that he couldn't get it in all of our names.
>
> "Q. Did you discuss that letter with your husband? A. Yes.
>
> "Q. You were then in Honolulu, were you? A. Yes.
>
> "Q. What was said between you and your husband about this letter? A. Well, my brother wrote and said that,—
>
> "Mr. Liggett: I object to that conversation between husband and wife as privileged and therefore not admissible in evidence without the consent of the husband.
>
> * * * * * *
>
> "Q. Now, before we go into the conversation with you and your husband, did your husband direct you to reply to George Smallen to the contents of the letter that we are discussing? A. You mean after we received the letter from my brother, did my husband tell me to write back?
>
> "Q. Yes? A. He told me that it was perfectly all right to go ahead the way that my brother wrote and told us how he was going to get the bonds, that that was all right.
>
> "Mr. Liggett: Now he is getting something in the back door that he couldn't get in the front door. I will object to that, move to strike the testimony she is attempting to give.
>
> "The Court: May be stricken for the purposes of the objection.
>
> "Mr. Liggett: I object to it on the grounds it is privileged.
>
> * * * * * *
>
> "The Court: Well, the question whether or not the plaintiff has waived the rights under Section 1881 of the Code of Civil Procedure is now before the Court in this respect; on cross examination, I believe plaintiff denied the matters which she is about to testify to. Now, whether or not the defendant can now bring it in for the purpose of impeaching his statement is a question for the Court to determine. I am inclined to believe that by virtue of his denial and perhaps he has waived his right to the provisions of Section 1881 C.C.P. Objection will be overruled.
>
> "Mr. Miller: Read the question please. (Pending question read by the reporter).
>
> "A. Yes. He said that that was perfectly all right to go ahead. That it was all right to go ahead and do that because that was the whole idea of leaving the money there, was so that they could use it if it was necessary. If they went ahead and put it back in some way that they couldn't use it and we were in Honolulu and couldn't *us* it, it wouldn't have done any good to leave it there in the first place.
>
> "Q. Did he at that time or at any other time make any objection to the proposal that these bonds be purchased in your name and the name of your brother? A. No.
>
> * * * * * *
>
> "A. * * * I wrote to my mother and brother and told them it was perfectly all right."

Section 1881, subdivision 1, of the Code of Civil Procedure provides:

> "1. *Husband and wife.* A husband can not be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communcation made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, * * *."

In People v. Loper, 159 Cal. 6, 112 P. 720, it was recognized that a divorced woman could not testify as to communications during marriage, although she might testify as to other matters such as the mental condition of her husband.

In Ayres v. Wright, 103 Cal.App. 610, 284 P. 1077, 1081, it was held under the section and subdivision quoted that one spouse may not testify for or against the other without consent. The code section contains no exception in case of agency and so the testimony was not admissible. In the opinion in that case, the Court says:

> "We are governed, however, by a Code provision which makes no such exception, and it is presumed that, in the absence of an express exception, no such qualification of the rule was intended. Trout v. Ogilvie, 41 Cal.App. 167, 174, 182 P. 333; Forbes v. City of Los Angeles, 101 Cal.App. 781, 282 P. 528. In construing an enactment identical in language, the Supreme Court of Idaho declared that the statute was controlling, and admitted no exceptions other than those placed there by the Legislature. Watkins v. Lord, 31 Idaho 352, 171 P. 1133. See, also, Falk v. Wittram, 120 Cal. 479, 481, 52 P. 707; Marple v. Jackson, 184 Cal. 411, 414, 193 P. 940."

See, generally, on this subject, a note in 2 California Law Review 148, and 2 Wigmore on Evidence, 3rd Ed., sections 600–603, inclusive.

Certain communications, however, have been held not to be privileged. Poulson v. Stanley, 122 Cal. 655, 55 P. 605; Savings Union Bank & Trust Co. v. Crowley, 176 Cal. 543, 547, 169 P. 67; In re Estate of Gillett, 73 Cal.App.2d 588, 166 P.2d 870.

[2] An exception to the rule is found in waiver which will occur when one spouse relies upon a contract with the other, and so it was held in Tobias v. Adams, 201 Cal. 689, 258 P. 588, 592, that in an action by a third party against one of the spouses the privilege respecting marital communications does not exist where the spouse sued relies upon a contract made with the other spouse. That was a suit by creditors to set aside a deed made by Adams to his wife, alleged by plaintiff to have been made to defraud the husband's creditors. The husband and wife had made and filed for record, which was pleaded in the suit, an agreement by which the husband relinquished all his community interests standing in his name, and certain other property. It was held that the provisions of section 1881, Code of Civil Procedure, did not apply. As the defendants relied upon the written agreement, they could not take advantage of the privilege that either spouse, without the consent of the other, may not testify to communications. It was held that the conversations between the husband and wife might be proved by the wife though the husband objected.

[3] We think, on the authority of that case, it was not error to admit the testimony of the wife under the similar circumstances here present. The nature of the contract between the husband and wife and the wife's brother is the issue made by the complaint. By raising this issue, the husband thereby opened the door to determine what that contract was in its entirety, including any amendments or novations thereof.

> "It would be monstrous (says the Court in the Adams case, [201 Cal. at] page 699 [258 P. at page 592]) if husband and wife might between themselves conspire to defraud the creditors of the one or the other, and to conceal their act produce a written instrument which is immune from all inquiries, and which must be accepted by the defrauded party as final. The freedom of contract between husband and wife and the power to transmute community property into separate property or *vice versa* by agreement between themselves renders it imperative that, when such an agreement is relied upon by their joint answer, thereby the whole subject-matter of said agreement is open to inquiry which may include communications from one to the other. This we understand upon examination of the transcript to be the effect of the holding in Johnston v. St. Sure, 50 Cal.App. 735, 195 P. 947, rehearing denied by this court."

The informality of the family agreement sufficient for the needs of the parties until divorce litigation commenced, gives the agreement here in suit all the weight due to a written, recorded agreement between the husband and wife alone. We think, under the circumstances here present, the privilege was waived by the husband, and find no error in the admission of the evidence.

[4] Section 1881, subdivision 1, of the Code of Civil Procedure, was not enacted to be used as an instrument to prevent justice, or to permit a husband to initiate litigation which could only succeed by locking the lips of his former wife.

Judgment is affirmed.

TURRENTINE, P. J., concurs.

114 Cal.App.2d 176

PRICE v. PRICE.

Civ. 19073.

District Court of Appeal, Second District,
Division 1, California.
Nov. 12, 1952.

Action by husband against wife, wherein the Superior Court, Los Angeles County, R. A. Newell, J. pro tem., granted husband a divorce upon grounds of desertion and extreme cruelty, and the wife appealed. The District Court of Appeal, White, P. J., held that the evidence supported the judgment.

Affirmed.

1. Divorce 🔑184(6)

In divorce suit, it was function of trial court to evaluate the testimony and resolve conflicts therein.

2. Divorce 🔑184(6)

On appeal from interlocutory judgment of divorce, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trier of facts.

3. Divorce 🔑130, 133(1)

Evidence sustained interlocutory judgment of divorce granted upon grounds of desertion and extreme cruelty. Civ.Code, § 130.

4. Appeal and Error 🔑931(3)

Where findings of fact have been waived, appellate court will not weigh evidence to determine what is true and what is not, but will assume that trial court found every fact essential to support judgment, and will search record for purpose only of determining whether there is substantial evidence supporting judgment, resolving all doubt in favor of judgment.

5. Divorce 🔑184(12)

In husband's divorce suit, there was no prejudicial error in excluding previous divorce action record, introduced for purpose of impeaching husband's testimony that he had not communicated with his wife after 1931, even if testimony sought to be impeached was material and record, made in 1933, constituted evidence of "communications" by husband to his wife.

6. Divorce 🔑69

One of main objects of statute requiring denial of divorce where there has been unreasonable lapse of time, is to prevent collusion or fraud. Civ.Code, §§ 124–126.

7. Divorce 🔑37(1)

Offense of desertion is a continuing one.

8. Divorce 🔑184(6)

Question as to whether, in particular circumstances involved, lapse of time before commencement of divorce action was unreasonable was for trial court to determine. Civ.Code, §§ 124–126.

◆

Spray, Gould & Bowers, Olga Phillips Anderson, Los Angeles, for appellant.

Houser & Beam, Long Beach, for respondent.

WHITE, Presiding Justice.

This is an appeal by the defendant wife from an interlocutory judgment of divorce granted upon the grounds of desertion and extreme cruelty. It is contended that plaintiff's testimony is not corroborated as required by section 130 of the Civil Code; that the trial court erred in excluding from evidence the record of a previous divorce action which had been brought by the plaintiff and dismissed, and which was offered for the purpose of impeachment; and that the plaintiff failed to overcome the presumption arising under the provisions of section 125 of the Civil Code when there has been unreasonable delay in commencing an action for divorce.

With respect to the asserted lack of corroboration, appellant submits that plaintiff's testimony that the parties separated in 1923 was not corroborated, in that the testimony of the corroborating witness supports the contention of defendant that the separation did not take place until June, 1925. Further, it is pointed out that a defense witness testified that the parties lived in an apartment over the garage belonging to the witness until June, 1925.

In substance, plaintiff testified that defendant unjustly accused him of consorting with other women, threw water in his face instead of assisting him when on occasions a World War I lung injury caused him to gasp for breath, had him ousted from the home of the parties, and threatened to use force should he attempt to return. That when he attempted to return at a later date he was prevented from entering the premises by the police, who informed him they had been ordered to keep him away. That the defendant refused ever to live with him again; that they separated about April 1, 1923, and since that time defendant had wilfully refused to live with him.

Bertha Schmidt testified by deposition that she had observed defendant's attitude toward plaintiff, which attitude was not one of affection or love, but instead defendant quarreled with plaintiff without provocation; that the witness was present on or about April 1, 1923, when plaintiff attempted a reconciliation and defendant refused to live with plaintiff, threatening force if plaintiff did not leave the premises; that to the witness' knowledge plaintiff and defendant did not reside together after that time.

It is urged that the corroborative testimony is insufficient, or rather, inadmissible, because of the testimony offered by the defendant wife and another witness to the effect that after the separation in 1923 there was a reconciliation and the parties lived together until the plaintiff deserted the defendant in 1925. Appellant contends that this testimony was uncontroverted.

[1–4] Appellant's argument, in effect, is that her testimony and that of her witnesses should be accepted and the testimony of the plaintiff should be rejected. It was the function of the trial court to evaluate the testimony and resolve conflicts therein. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact, In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. The evidence presented by the plaintiff was sufficient to support the judgment rendered by the trial court. Further it is the rule that when, as in the cause now before us, findings of fact have been waived, the appellate court will not weigh the evidence to determine what is true and what is not, but will assume that the trial court found every fact essential to support the judgment, and will search the record for the purpose only of determining whether there is substantial evidence supporting the judgment and will resolve all doubts in favor of the judgment, Baker v. Baker, 98 Cal. App.2d 424, 425, 426, 220 P.2d 576, and cases cited.

[5] With respect to appellant's second point, the record reveals that on cross-examination plaintiff testified that he had not communicated with his wife, directly or indirectly, since about 1930 or 1931. A copy of a "petition for divorce" filed by plaintiff in 1933, was then offered in evidence for the stated purpose of impeaching plaintiff's testimony. Assuming that the testimony sought to be impeached was material, and further assuming that the proffered document constituted evidence of "communication" by the plaintiff to his wife, nevertheless its exclusion cannot be characterized as prejudicial error. At most, the proffered document showed that the plaintiff, testifying in 1951, was in error as to the date of something which occurred eighteen years before. As the trial court commented, "* * * if that document were actually introduced into evidence, it would not bear much weight with me as to the actual communication between the plaintiff and the defendant."

Section 124 of the Civil Code, so far as here pertinent, provides that a divorce must be denied "when there is an unreasonable lapse of time before the commencement of the action." Section 125 of the Civil Code provides: "Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense." However, section 126 of the Civil Code provides that the presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay.

[6–8] One of the main objects of the foregoing Civil Code sections is to prevent collusion or fraud, Hansen v. Hansen, 86 Cal.App. 744, 751, 261 P. 503. In the present cause, as in the cited case, the record dispels any intimation of collusion. Further, the offense of desertion is a continuing one, Van Ness v. Van Ness, 32 Cal. App.2d 66, 68, 89 P.2d 166; Dee v. Dee, 87 Cal.App. 17, 19, 261 P. 501. Whether in the particular circumstances the lapse of time was reasonable was a question for the trial court to determine, Hansen v. Hansen, supra, 86 Cal.App. at page 751, 261 P. at page 505. As heretofore stated, we must assume that the court found every fact necessary to support the judgment, and the record discloses evidence as to the plaintiff's financial difficulties and chronic ill health which the court no doubt took into consideration in concluding that the delay was not unreasonable.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

114 Cal.App.2d 232

ESPINOSA et al. v. BEVERLY HOSPITAL et al.

Civ. 18978.

District Court of Appeal, Second District, Division 2, California.

Nov. 17, 1952.

Hearing Denied Jan. 15, 1953.

Action for damages as alleged result of defendants' negligence in delivering to plaintiff spouses another baby than one born by plaintiff wife at corporate defendant's hospital. From a judgment of the Superior Court, Los Angeles County, Benjamin J. Scheinman, J., on a jury's verdict for defendants, plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that an instruction to the jury that mental suffering alone would not support the action and that plaintiffs could not recover, unless the jury found that plaintiffs suffered actual physical injuries as the proximate result of defendant's negligence, because fright or mental suffering alone would not sustain recovery, was not error.

Judgment affirmed.

1. Damages ⟹49

Mental suffering alone will not support action for damages based on negligence.

2. Damages ⟹52

A person can suffer bodily injury through others' negligence only by physical impact, shock through senses to nervous system, or both, and in either event actionable mental suffering may result, but mental disturbance is not necessarily caused by such a shock merely because it is an injury to body rather than mind.

3. Damages ⟹216(10)

In spouses' action against hospital corporation and another for damages because of defendants' alleged negligence in delivering to plaintiffs another baby than one born by plaintiff wife at corporate defendant's hospital, instruction to jury that mental suffering alone would not support such an action and that plaintiffs could not recover, unless jury found that plaintiffs suffered actual physical injuries as proximate result of defendants' negligence, because fright or mental suffering alone would not sustain recovery, was not error.

4. Trial ⟹312(1)

In spouses' action for damages because of defendant's delivery to plaintiffs of another baby than that born by plaintiff wife at defendant corporation's hospital, trial court properly refused to state his opinion in answer to jury forewoman's inquiry as to whether loss of sleep constitutes physical injury, in view of court's instruction, re-read by him, that definite nervous disturbances caused by mental shock are physical injuries warranting award of damages, if proximate result of defendants' negligence, and that jury might consider plaintiffs' loss of sleep, if proximate result of physical consequences or injuries, in awarding damages.

5. Damages ⚷208(6)

Whether spouses, suing hospital corporation and another for damages because of defendants' delivery to plaintiffs of another baby than that born by plaintiff wife at corporate defendants' hospital, suffered emotional shock, with consequent loss of sleep, as result of defendants' negligence, and, if so whether such shock resulted in physical injuries, were fact questions for jury.

6. Appeal and Error ⚷930(1)

On appeal from judgment on jury's verdict, all presumptions are indulged in favor of verdict.

◆

Hahn, Ross & Saunders, and Albert Wm. Thomas, Los Angeles, for appellants.

DeForrest Home, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant Isabel Espinosa entered respondent hospital under contract to receive obstetric care and services at the birth of her baby. On the third day thereafter respondents delivered to Isabel an infant purporting to be her own. Appellants took such child to their home and cared for it until their discovery that it was the offspring of others. On making known their grievance to respondents, the latter delivered to appellants another child which they asserted was the progeny of appellants.

This action was instituted to recover $50,000 damages allegedly resulting from respondents' negligence in causing "profound shock to their nervous systems; that they sustained great physical and mental suffering and were made sick, sore and lame." The jury having returned a verdict in favor of respondents, appellants now seek a reversal of the judgment entered thereon.

[1, 2] The Espinosas' demand is based primarily upon the court's having given the following instruction:

> "You are instructed that mental suffering alone will not support an action for damages of this kind. Therefore, if you find that the only injury suffered by plaintiff was mental suffering, then your verdict must be for the defendants and against plaintiffs.
>
> "Unless you find that plaintiffs suffered actual physical injury as the proximate result of defendants' negligence, they cannot recover in this case because fright or mental suffering alone will not sustain a recovery for plaintiffs."

In addition to this instruction, the court properly addressed the jury upon the issues raised by the pleadings. They were told that "definite nervous disturbances or disorders caused by mental shock and excitement are classified as physical injuries and will support an action for damages for negligence where they are the proximate result of negligence on the part of the defendants." It is presumed that if the jury had found such "disturbances or disorders" to have resulted to appellants or either of them from nervous shock, they would have returned a verdict for appellants. Since the jury did not do so, appellants now seek to subvert the ancient rule that mental suffering alone will not support an action for damages based upon negligence. It cannot be overemphasized that the human body can through negligence of others suffer injury in only two ways: (1) by physical impact, and (2) by shock, through the senses, to the nervous system. A person can suffer both at the same time or he can experience one alone. In either event, actionable mental suffering may result. But merely because a shock to the nervous system is an injury to the body rather than to the mind, Easton v. United Trade School Contracting Company, 173 Cal. 199, 203, 159 P. 597, L.R.A.1917A, 394, it does not necessarily follow that every mental disturbance is caused by a shock to the nervous system. Had the delivery of the wrong baby produced such an impact upon the nervous system of either appellant as to cause physical injuries, the jury were, under their instructions, authorized to award damages for such injuries and to supplement them with damages for mental suffering, anxiety and loss of sleep. The only evidence of injury was the testimony of Mrs. Espinosa that she had severe back and stomach pain and ached all over. Evidently, the jury did not credit such complaints to nervous shock. Because there were no physical injuries, recovery for mental suffering was not authorized. Ibid.; Sloane v. Southern California Railway Company, 111 Cal. 668, 680, 44 P. 320, 32 L.R.A. 193.

Appellants have argued at great length and have cited many authorities to show that damages are recoverable for mental worry and suffering entirely disconnected with physical pain. As to their argument they assume a false major premise while their authorities are at once distinguishable. In Sandoval v. Southern California Enterprises, Inc., 98 Cal.App.2d 240, 219 P.2d 928, and in Bethurum v. Krumm, 109 Cal. App. 5, 292 P. 287, the plaintiff was entitled to recover for injuries brutally administered to his body, and incidentally for mental suffering. In State Rubbish Collectors Association v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282, defendant recovered damages on account of fright and succeeding illness suffered by reason of serious threats by the officers of the plaintiff to do him bodily harm. In Emden v. Vitz, 88 Cal.App.2d 313, 198 P.2d 696, likewise an action for an intentional tort, the plaintiff was purposely locked out of her apartment. She suffered such an indignity as to shock her emotional system and to cause substantial physical injury resulting in mental suffering. In four of appellants' authorities, Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L.R.A.,N.S., 559; May v. Farrell, 94 Cal.App. 703, 271 P. 789; Graham v. Yellow Cab Co., 125 Cal.App. 141, 13 P.2d 773; Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271, the plaintiff in each instance had to undergo bodily pain and ensuing mental suffering by reason of the defendant's negligence. In Medeiros v. Coca-Cola Bottling Company, 57 Cal.App.2d 707, 135 P.2d 676, the plaintiff was shocked at finding a brush which he thought was a spider in his bottle and believed he had swallowed a part of it. The experience caused him such an emotional paroxysm as to result in compensable physical suffering and worry.

[3] Not one of the foregoing decisions provides a precedent for appellants' recovery. The act they complain of was negligence, but neither appellant was caused physical suffering. Had the jury so found, an award of damages could not have been avoided under the instructions given. Since they found nothing more than mental suffering and loss of sleep, the law would not have supported an award in their favor. There was no error in the quoted instruction.

[4, 5] Appellants assign as prejudicial the act of the court in not giving a categorical answer to an inquiry by the jury's forewoman as to whether loss of sleep constitutes physical injury. The court correctly avoided giving its opinion as an answer to the question but instead it reread the instructions: (1) that definite nervous disturbances caused by mental shock are classified as physical injuries and will warrant an award of damages for negligence if they are the proximate result of defendants' negligence and (2) that "if as the proximate result of physical consequences or physical injuries the plaintiff suffered loss of sleep, you may consider that in the matter of awarding damages * *" Such instructions clearly stated the law with reference to loss of sleep and authorized the jury to award damages if they had found plaintiffs to have suffered a physical injury proximately resulting from defendants' negligence. Emden v. Vitz, supra, is not authority for declaring that loss of sleep is a physical injury. The court there observed that *the conduct of defendants caused plaintiff to become frightened, and as a proximate result thereof, to suffer emotional disturbances and an upset of her glandular condition,* causing a number of bodily ills. Whether Mr. or Mrs. Espinosa suffered emotional shock with consequent loss of sleep, and if so whether it resulted in physical injuries are questions of fact and as such were determined against appellants under appropriate instructions.

[6] Since all presumptions are indulged in favor of the verdict, the jury either found no negligence or found no nervous

shock, or found contributory negligence on the part of appellants. The finding of any one of those facts was authorized by the evidence and the law.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, J., dissenting.

114 Cal.App.2d 167

ORTZMAN v. VAN DER WAAL et al.

Civ. 19070.

District Court of Appeal, Second District,
Division 1, California.
Nov. 12, 1952.
Rehearing Denied Dec. 8, 1952.
Hearing Denied Jan. 9, 1953.
See 252 P.2d 7.

Action for injuries to plaintiff's right breast allegedly suffered when plaintiff's automobile which had stopped for a stop sign at intersection in city was struck from rear by defendant's truck, allegedly causing plaintiff's right breast to strike knob on steering wheel. The Superior Court of Los Angeles County, A. A. Scott, J., entered a judgment in favor of plaintiff upon a verdict of jury in sum of $100 and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem, held that implied jury finding that plaintiff suffered no breast injury as result of collision, approved by trial court by denial of plaintiff's motion for new trial, could not be disturbed on appeal.

Judgment affirmed.

1. Evidence 🔑571(9)

Jury was not bound to accept opinions testified to by doctors who testified for plaintiff as to causal connection between collision and injuries of which plaintiff complained, notwithstanding defendant produced no medical testimony.

2. Evidence 🔑574

Even if several competent experts concur in their opinions, and no opposing opinion is offered, jury is still bound to decide issue upon their own judgment assisted by statements of experts.

3. Evidence 🔑571(9)

In considering weight to give testimony of doctors who testified for plaintiff as to causal connection between accident and injuries, jury was entitled to consider not only reasons given therefor but previous medical history of plaintiff, statement of plaintiff immediately following accident that plaintiff was not hurt, and fact that several weeks elapsed after accident before manifestation of a mass on plaintiff's breast, requiring surgery and removal of breast.

4. Witnesses 🔑311, 315, 363(1), 409

In passing on credibility of a witness, trier of facts may consider interest of witness in result of case, as well as manner in which he testifies, character of his testimony, his motive, and contradictory evidence. Code Civ.Proc. § 1847.

5. Evidence 🔑594

Trier of facts may reject testimony of witness in toto, though uncontradicted, if trier does not act arbitrarily. Code Civ. Proc. § 1847.

6. Evidence 🔑589
Witnesses 🔑315

In judging weight to be accorded to plaintiff's testimony relative to whether collision caused breast injury, jury could consider not only plaintiff's interest in case, but all facts surrounding collision as testified to by plaintiff and other witnesses, including force of blow, plaintiff's disavowal of injury at time, location of knob upon steering wheel allegedly struck by plaintiff's breast, as disclosed by photograph introduced into evidence by plaintiff, and manner in which plaintiff testified.

7. Appeal and Error 🔑1005(1)

In action for injuries to plaintiff's right breast allegedly suffered by plaintiff when plaintiff's automobile which had stopped for a stop sign at intersection in city was struck from rear by defendant's truck, allegedly causing plaintiff's right breast to strike knob on steering wheel, implied jury finding that plaintiff suffered no breast injury as result of collision, approved by trial court by denial of plaintiff's motion for new trial, could not be disturbed on appeal.

8. Trial ⚷253(3)

Instruction precluding plaintiff from recovering from defendant if breast injury complained of by plaintiff in action for injuries arising from automobile collision was solely attributable to a condition existing prior to collision, was erroneous where plaintiff also sought recovery for damages to plaintiff's automobile.

9. Trial ⚷194(20)

In action for injuries to plaintiff's right breast allegedly suffered by plaintiff in automobile accident, given instruction that if jury found there was breast tenderness suffered by plaintiff prior to collision, and if resultant condition might be solely attributed to pre-existing condition, plaintiff could not recover, was not objectionable as telling jury as a fact that pre-existing heart condition was cause of condition plaintiff attributed to collision.

10. Trial ⚷296(11)

In action for injuries to plaintiff's right breast allegedly suffered by plaintiff in automobile accident, given instruction that if jury found there was breast tenderness suffered by plaintiff prior to collision, and if resultant condition "may be" solely attributed to pre-existing condition, plaintiff could not recover, was not objectionable on ground that quoted words permitted jury to speculate and deal in mere possibilities, in view of other given instructions.

◆

Hahn, Ross & Saunders, Los Angeles, for appellant.

Betts, Ely & Loomis, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

In this action for personal injuries allegedly resulting from a collision between the motor vehicles of the respective parties, plaintiff appeals from a judgment in her favor entered upon a verdict of the jury in the sum of $100.

As grounds for reversal appellant contends (1) that the judgment is not supported by the evidence in that the damages awarded were inadequate and not commensurate with the nature and extent of the injuries sustained by her and (2) that the court erred in giving an instruction hereinafter noted.

The accident in question occurred during the noon hour on June 30, 1950, at the intersection of Figueroa and 23rd streets in the city of Los Angeles. Immediately prior thereto the appellant was driving her Bantam Austin automobile in a southerly direction on Figueroa street in the traffic lane nearest the center line thereof and had brought her vehicle to a stop at the intersection in response to the red light displayed by the mechanical signal regulating traffic at that point, when she was struck from the rear by the truck of the respondent Allied Steel Products Co. and being driven by its employee, respondent Van Der Waal.

Since the jury resolved the question of liability in favor of appellant is is unnecessary to set forth in detail the facts of the accident other than to observe, inasmuch as the same may be material to a consideration of the questions presented, that appellant testified that as a result of the collision she was thrown forward while her head was thrown backward; her right side struck the steering wheel and the upper portion of her right breast struck the knob on the steering wheel. The testimony of the respondent driver is to the effect that immediately prior to the collision he was traveling behind the appellant at about five miles per hour in low gear, had applied his brakes when within approximately five feet of the appellant's car, and that as a result of the impact the car of appellant was caused to move forward about three feet. Immediately following the accident in response to a question by respondent driver, appellant stated that she was not hurt although upon the trial she testified that she then felt pain. The damage to appellant's automobile was relatively slight, the total cost of repairs being but $37.15.

Appellant did not seek medical advice or attention until some three weeks following the accident at which time she consulted Dr. Schade, who had treated her professionally over a period of approximately four years for various illnesses, including pain in the breast during the month of October, 1949. On the occasion of her visit to Dr.

Schade following the accident appellant complained of pain in her right breast as well as down her right arm. Dr. Schade as a result of the examination then made by him found there was tenderness along the margin of the muscle that forms the shape of the chest and marked tenderness in the outer half of the breasts. Diathermy treatment was then prescribed and administered until sometime during the month of October when a small firm mass was felt on the outer aspect of the breast, which upon further examination was determined to be necrosis or dead tissue with inflammation present. The mass was excised on February 23, 1951, and later on April 10, 1951, further surgery was performed which involved the removal of the entire right breast, which latter operation the doctor testified was necessitated by the recurrence of masses in the breast with pain and evidence of inflammation.

Upon the basis of his examination and treatment of the appellant as well as the history given by her, which included the statement that as a result of the accident she struck her breast upon the steering wheel knob, the doctor concluded that the condition necessitating the treatment and surgery was the result of the blow on the breast which she thus sustained, and which resulted in bleeding into the breast tissue with the resultant formation of a hematoma within the substance of the breast which became infected. A substantially similar opinion, based upon the same premise was expressed by Dr. Regan, who performed some of the surgery previously related. Since the removal of the breast several other masses manifested themselves above the outer margin of the main muscle mass of the right chest and immediately below that site causing pain and which condition the doctor testified will require further surgery.

Appellant has an extensive medical history dating from the time she was stricken with polio at the age of sixteen months as a result of which she was and continued to be handicapped in the use of her lower extremities. Prior to her treatment following the accident she had undergone some thirty previous operations mostly orthopedic in character and designed to correct the condition of her legs but including also a hysterectomy in July, 1948, which included the removal of one ovary. It also appears that she had painful or "shotty" breasts in July of 1948; suffered from chronic cystic mastitis (cysts in the breast area) in 1947 and 1948; and had foreign masses or polyps in 1944, some of which were excised in 1948.

The respondents produced no medical testimony, and counsel for appellant strenuously assert that therefore the jury was bound to accept the opinions expressed by appellant's experts as to the causal connection between the accident and the injuries of which she complains, and that as a necessary consequence the jury's award is so palpably inadequate as to require a reversal. With this contention we can not agree.

[1-3] The jury was not bound to accept the opinions expressed by the medical experts called upon behalf of the appellant and they were properly so instructed. "Even if several competent experts concur in their opinions, and no opposing opinion is offered, the jury are still bound to decide the issue upon their own judgment assisted by the statements of the experts." 10 Cal. Jur. 972. Nor does the presence of expert testimony exclude consideration of other facts which are pertinent to the issue involved. Here the jury in considering the weight to be accorded to the testimony of the experts were entitled to take into consideration not only the reasons given therefor, but the previous medical history of the appellant which we have set forth in some detail; the statement of appellant immediately following the accident that she had not been hurt; and the lapse of time between the alleged injuries and the manifestation of the mass in her breast.

[4, 5] Moreover, as already noted, the opinions expressed by appellant's experts were predicated in part upon her statement to them that as a result of the accident her right breast was caused to strike the knob upon the steering wheel. While, as counsel for appellant assert, no witness testified to the contrary, it by no means follows as they assume that the jury were concluded by her

testimony in this respect. While it is sometimes broadly stated that the uncontradicted testimony of a witness to a particular fact may not be disregarded, 10 Cal.Jur. 1143, this statement is subject to definite limitations. The true rule in this regard is stated in Hicks v. Reis, 21 Cal.2d 654, 659, 134 P.2d 788, 790, as follows: "The trier of the facts is the exclusive judge of the credibility of the witnesses. § 1847, Code Civ.Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal.Jur. 180, § 154. Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. Blank v. Coffin, supra [20 Cal.2d 457, 126 P.2d 868]; Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc., Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99; see cases collected in 27 Cal.Jur. 182, § 156; Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 796."

And in Market Street Ry. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41, 43, it is said: "It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given."

[6, 7] Thus in judging the weight to be accorded appellant's testimony in this respect the jury were entitled to consider, not only her interest in the case, but all of the facts surrounding the accident as testified to by her and the other witnesses including, among other things, the force of the blow, her disavowal of any injury at the time, the location of the knob upon the steering wheel as disclosed by a photograph introduced into evidence by the appellant hereself, and the manner in which she testified. In the light of their verdict it is but reasonable to conclude that the jury disbelieved the appellant's testimony and determined that she suffered no injury to her breast as a result of the accident as claimed by her. Moreover the trial judge who had the opportunity of seeing and hearing the witnesses, in denying appellant's motion for a new trial, thereby expressed his approval of this implied finding, and hence this court is powerless to disturb the same.

Appellant complains of the following instruction given at the request of respondents: "You are instructed that if you find that there was breast tenderness complained of and suffered by plaintiff prior to the happening of the accident on July 30, 1950, and if you find the resultant condition of her breast may be solely attributed to the pre-existing condition thus complained of by her, she is in no wise entitled to recover from defendants."

[8] Inasmuch as appellant sued to recover not only for the personal injuries alleged to have been suffered by her as the result of the accident, but also for resultant damage to her automobile, it is apparent that the instruction is erroneous, for her right to recover for damage to her automobile would in no wise be dependent upon her physical condition antecedent to the accident in question or the extent of the injuries sustained to her person. Inasmuch, however, as the proof of damage to the automobile was limited to the sum of $37.15 and the jury returned a verdict in her favor in the sum of $100, it is apparent that the jury were not misled and that appellant suffered no injury as a result thereof. Indeed counsel for appellant make no complaint of the instruction in this regard but predicate error in the giving of the in-

struction upon the ground that thereby the jury was told, "that there was evidence that a pre-existing tenderness of the breast, that is, a condition of tenderness antedating the injury, which was the cause of the breast removal and every other element of damage appellant attributes to the accident."

[9] Whatever other infirmities inhere in the instruction, it may not be said to be subject to the construction suggested by counsel. The jury could not, in our view, have understood that thereby they were being told, *as a fact,* that the pre-existing condition of the appellant's breast was the cause of the condition which she attributed to the blow to her breast which she claims to have sustained as a result of the accident. If we correctly understand appellant's brief, the basis of her complaint would appear to be, in part, that the instruction was unwarranted because respondents called no medical expert to contradict the opinions expressed by appellant's physicians which have previously been adverted to. To this extent at least their contention here would appear to differ in no substantial respect from that previously discussed and disposed of adversely to appellant. As already noted, the opinions of those experts were neither binding upon the jury nor did they operate to remove from the case the factual question as to whether appellant in fact sustained an injury to her breast as a result of the accident.

[10] Further, counsel complain of the use in the instruction of the words "may be," asserting that thereby the jury was permitted "to speculate and deal in mere possibilities." While the instruction in question is by no means a model, and we refrain from expressing our approval thereof, we do not consider it justly subject to criticism in this respect. When considered in the light of the other instructions, a jury composed of reasonable persons could only understand therefrom that if, after considering all of the evidence, they were unable to determine whether the injuries of which appellant complained were a result of appellant's pre-existing physical condition rather than of the accident in question, they should find upon this issue in favor of the respondents. This was but another way of stating what the jury had previously been told with respect to the burden of proof and preponderance of the evidence, namely, that if the evidence upon any issue was evenly balanced in their minds so that they were unable to say that the evidence on either side of the issue preponderated, their finding must be against the party carrying the burden of proof of that issue. For the reasons stated, while not free from criticism, we do not believe that the jury was misled by the instruction or that the giving thereof under the circumstances constituted prejudicial error.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

114 Cal.App.2d 217

PEOPLE v. LAWSON et al.

Cr. 4850.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1952.

The Superior Court of Los Angeles County, Edwin L. Jefferson, J., sitting without jury, found defendant guilty of possession of marijuana cigarettes which were found on rear floor board of his automobile, but found not guilty his co-defendant who had been his passenger in the automobile, and the defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ⚷260(11)

In prosecution for possession of marijuana cigarettes, tried to judge without jury, it was province of the judge to resolve conflict in the evidence. Health and Safety Code, § 11500.

2. Criminal Law ⚷260(11)

It is not the province of the District Court of Appeals to weigh conflicting evidence but only to decide whether upon face of evidence sufficient facts could not have been found by the trial court to warrant its implied findings.

3. Poisons ⚷9

Evidence was sufficient to sustain conviction for possession of marijuana cigarettes. Health and Safety Code, § 11500.

4. Criminal Law ⚷260(11)

In prosecution of driver of automobile and his passenger for possession of marijuana cigarettes found on rear floor board of automobile, whether passenger was accomplice of driver was question of fact for trial court. Health and Safety Code, § 11500.

5. Criminal Law ⚷507(1)

Fact that two defendants are jointly charged with crime does not determine question as to whether they are in fact and law accomplices, and a verdict of not guilty as to one is finding of fact that he was not an accomplice of the other.

◆

Danny R. Jones, Compton, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Two police officers in a patrol car came up behind defendant Emery Charles Newsom's car. It was dark, in the early morning hours after midnight. The officers threw their red light upon defendant, and he pulled over to the curb. He had a passenger riding in the front seat with him, Ben R. Lawson, Jr.

The two men got out of their car. The officers searched it and found nineteen marijuana cigarettes on the floor board behind the front seat.

The officers arrested the men, took them to jail, and charged them with possession of the narcotic. Sec. 11500, Health and Safety Code.

Lawson, the passenger, first told the officers that he knew nothing about the marijuana cigarettes. Then, in the presence of Newsom he said that just before the arrest Newson said to him, "Try to take this dope and get rid of it. * * * You take the 'beef', because you will only get just about ninety days, and I have been arrested for narcotics before." This Lawson said he told Newsom he would not do.

Trial by jury was waived, and the issues on the pleas of not guilty by both defendants were submitted to the trial judge. On the trial Lawson testified to the request made of him by his co-defendant, and to his refusal to take the responsibility for the marijuana. The trial court found Lawson not guilty; Newsom guilty.

Newsom appeals from the judgment which followed, and from an order denying his motion for a new trial.

Newsom testified in his own behalf that he did not know where the marijuana came from, and that he had had nothing whatsoever to do with it. In many interviews with police officers he maintained that he knew nothing about the cigarettes.

On the evening in question Newsom had been at the Samba night club in Los Angeles. While there, for $2 he agreed to take two friends of his, a man and wife, to their home in Compton. Just before leaving the night club he invited Lawson to go along, "for the ride."

On the way to Compton the man drove Newsom's car, and his wife rode with him on the front seat. Newsom and Lawson rode in the back seat. When the party reached their destination the man and his wife got out of the car, Newsom and Lawson got into the front seat, Newsom driving, and started back to Los Angeles.

On the trial this man and his wife testified that when Lawson got out of the car he showed them some cigarettes, said they were marijuana, and offered to sell them to them, which offer they refused.

In his brief defendant sums up the testimony: "the only connection of defendant Newsom with the said cigarettes was the testimony of defendant Lawson and the fact that they were found in the car of defendant Newsom."

[1-3] It is, of course, apparent that the evidence is in hopeless conflict. But the evidence as defendant sums it up in his brief, standing alone, if believed by the trial court was sufficient to sustain the conviction. Under the rule enjoined upon us all by the Constitution of this state, it was the province of the judge to resolve the conflict. And it is not the province of this Court to weigh conflicting evidence. "In resolving this issue, it is the settled rule that an appellate court 'will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by' the trial court to warrant its implied findings, and before they 'can be set aside * * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.'" People v. Jones, 36 Cal.2d 373, 224 P.2d 353, 354; and see People v. Rumley, 100 Cal.App.2d 6, 222 P.2d 913, prosecution for possession of marijuana; People v. Brown, 102 Cal.App.2d 60, 226 P.2d 609, prosecution for morphine; also, see 3 Cal. Jur.2d 407; Const. Art. VI, §§ 4a, 4b.

Defendant further contends that the testimony of Lawson "should not apply" because Lawson was an accomplice, and his testimony was not admissible under the provisions of section 1111, Penal Code.

The concluding sentence of that section reads: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[4, 5] Whether Lawson was an accomplice was a question of fact for the trial court. When the judge found Lawson not guilty, that question was determined adversely to defendant's contention. The fact that two defendants are jointly charged with crime does not determine the question as to whether they are in fact and in law accomplices. And a verdict of not guilty as to one defendant is a finding of fact that he was not an accomplice of another defendant convicted of the same crime with which both were charged. People v. Johns, 69 Cal.App.2d 737, 160 P.2d 102; People v. Morgan, 87 Cal.App.2d 674, 197 P.2d 413; People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519; People v. Deverich, 102 Cal.App.2d 215, 227 P.2d 45.

The judgment and order appealed from are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

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114 Cal.App.2d 275

MORRIS et al. v. MUTASCIO et ux.

Civ. 4194.

District Court of Appeal, Fourth District, California.

Nov. 19, 1952.

Hearing Denied Jan. 15, 1953.

Action by lessees against lessors for breach of an oral lease. The Superior Court, Riverside County, John G. Gabbert, J., entered judgment of dismissal on ground that no cause of action was stated, and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that plaintiffs' complaint, which alleged that defendants breached their agreement to cooperate in obtaining beer license for leased premises, but which alleged no facts indicating that failure to obtain license was due to any act or neglect on part of defendants, was insufficient to show causal connection between alleged breach and failure to obtain license, which, as hearing disclosed, was in fact denied because of proximity of premises to a school.

Judgment affirmed.

1. Landlord and Tenant 🔑48(1)

Lessees' complaint for breach of oral lease which alleged that lessors breached their agreement to cooperate in obtaining beer license for the premises, but which alleged no facts indicating that failure to obtain license was due to any act or neglect on part of lessors, was insufficient to show causal connection between alleged breach and failure to obtain license, which, as hearing disclosed, was in fact denied because of proximity of premises to a school.

2. Landlord and Tenant ⚿48(2)

To warrant recovery of damages against landlord for breach of oral lease, there must be a causal connection between the act or omission complained of and the loss or injury suffered.

3. Evidence ⚿10(6)

Court could take judicial notice of geographical fact that site for which beer license was sought was within 100 feet of a school.

◆

Wing, Wing & Brown, Banning, for appellants.

Thompson & Colegate, Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for breach of an oral lease. At the outset of the trial an objection to the introduction of any evidence was sustained on the ground that no cause of action was stated. A judgment of dismissal was then entered, from which the plaintiffs have appealed.

The amended complaint alleges that the defendants owned a hotel, apartment and store building in Palm Springs; that on March 28, 1948, the parties entered into an oral agreement and lease whereby the plaintiffs leased a storeroom in said building for two years commencing September 1, 1948, with a renewal option; that this agreement provided that the plaintiffs would equip and operate a restaurant, and that the defendants would cooperate with them in obtaining a license for the sale of beer on the premises, and would later reduce the agreement to writing; that the plaintiffs paid certain rentals, installed certain fixtures, and devoted their time to the business from September 11, 1948 to March 22, 1949; that the defendants failed to perform said agreement in that they opposed plaintiffs' attempts to obtain a beer license, refused to put the lease into writing, and entered the premises during the absence of plaintiffs and without their consent; that by reason of the failure of the defendants to perform their agreement the plaintiffs, on March 22, 1949, moved their stock and equipment from said storeroom; that by reason of these wrongful acts the plaintiffs have been damaged in certain amounts; that the plaintiffs were induced to enter into this agreement and lease by defendants' representations that they possessed information superior to that of the plaintiffs, and knew that such a license could be obtained; that plaintiffs, being nonresidents of the county, were unaware of the conditions and requirements necessary to obtain such a license; that they believed and relied upon defendants' representations; that beginning on August 17, 1948, and continuing through the fall the plaintiffs, over the objections of the defendants, endeavored to obtain such a license; that plaintiffs were not denied said license until January 31, 1949; that the lack of such a license made the operation of this business unprofitable to the plaintiffs or to anyone else; and that the plaintiffs would not have entered into this oral agreement and lease but for these representations.

The appellants contend that (1) this was an oral lease, and not an oral agreement to lease; (2) that respondents breached the lease by opposing and objecting to appellants' attempt to obtain a beer license, by refusing to put the lease in writing, and by entering the premises during their absence; and (3) that respondents are estopped to raise the defense of the statute of frauds.

Apparently for the purpose of avoiding the statute of frauds, the appellants insist that this was a present lease and not an agreement to execute a lease. In such a case, a breach of the oral agreement for a written lease would occur if and when the respondents caused the appellants to surrender possession, and not when or because the respondents failed to execute a written lease. Kaye v. Melzer, 87 Cal.App.2d 299, 197 P.2d 50. No such a breach ever occured here. The appellants voluntarily moved out and no attempt to dispossess them was ever made by the respondents. There is no allegation showing that any damage resulted from any failure to put this agreement in writing. Maynes v. Angeles Mesa Land Co., 10 Cal.2d 587, 76 P.2d 109.

The complaint was based upon an alleged breach of the lease, rather than upon fraud. Moreover, any misrepresentation incidental involved, knowledge that a license could be secured, was as to a matter governed by statewide laws and regulations. The appellants were not entitled to rely on any private influence as having a controlling effect on the securing of such a license.

[1–3] The only allegations of damage are based on the claim that this business could not be profitably operated without a beer license, and that the defendants had breached their agreement to cooperate with the plaintiffs in obtaining such a license. It was not alleged that the respondents had promised to secure such a license. It was not alleged that the appellants were prevented from getting such a license by any act of the defendants, and no facts were alleged which would in any way indicate that the failure to obtain a license was due to any act or neglect on the part of the respondents. The only material allegations in this regard are that the appellants endeavored to obtain a license, that they continued their efforts over the objection of the defendants, and that the license was not denied until January. No facts are alleged with respect to what the defendant had done, that this had anything to do with the denial of a license, or that any act of the respondents was a proximate cause of any supposed damage resulting from the failure to obtain a license.

It is fundamental that there must be a causal connection between the act or omission complained of and the loss or injury suffered. John Breuner Co. v. Western Union Tel. Co., 108 Cal.App. 243, 291 P. 445. Not only were the allegations of the complaint not sufficient to show such a causal connection, but a good reason for the application of the usual rules appears in the situation which was disclosed at the hearing on the objection to the introduction of any evidence. It was then brought out that the appellants' request for a license was denied by the Board of Equalization upon the express ground that the proposed site was within 100 feet from a school. The court could take judicial notice of the geographical facts involved. It would have been an idle act to have proceeded with the trial under the circumstances known to exist. If such an agreement was made its performance could have had no controlling effect. No amount of cooperation by the respondents could have changed the situation, and no damage could have flowed from any failure on their part to keep the alleged agreement to cooperate. While a breach of the agreement is alleged, the allegations of the complaint are not sufficient to show that any damage was proximately caused by any act or omission on the part of the respondents.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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114 Cal.App.2d 214

WHIPPLE ROAD QUARRY CO. v. L. C. SMITH CO.

Civ. 15194.

District Court of Appeal, First District,
Division 2, California.

Nov. 17, 1952.

Rehearing Denied Dec. 17, 1952.

Hearing Denied Jan. 15, 1953.

Action by lessor against lessee for declaratory relief and for a temporary injunction. The Superior Court, San Mateo County, Edmund Scott, J., denied application for temporary injunction, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that where affirmative covenants of lease, by which lessee was to operate property as commercial quarry, sell to the public at prevailing rates, and pay royalties to lessor, were specifically unenforceable as requiring protracted supervision and direction, lessor was not entitled to a temporary injunction to restrain lessee from breaching its negative covenant not to remove lessee's existing plant from the premises.

Order affirmed.

1. Injunction 🔑58

Where a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such nature that it cannot be specifically enforced by a judicial decree.

2. Injunction ⚷137(1)

Where affirmative covenants of lease, by which lessee was to operate property as commercial quarry, sell to public at prevailing rates, and pay royalties to lessor, were specifically unenforceable as requiring protracted supervision and direction, lessor was not entitled to a temporary injunction to restrain lessee from breaching its negative covenant not to remove lessee's existing plant from the premises.

3. Specific Performance ⚷75

Courts of equity will not decree specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will require protracted supervision and direction.

◆

Alfred J. Harwood, San Francisco, for appellant.

Mullin & Cost, San Mateo, for respondent.

DOOLING, Justice.

This is an appeal from an order denying an application for a temporary injunction. Appellant and respondent entered into an agreement of lease wherein appellant is lessor and respondent lessee. Respondent bound itself as lessee to operate the property as a quarry, to install certain equipment therein, to pay the lessor 7½¢ per ton for all rock removed, to sell to lessor all crusher base rock desired by lessor at 65¢ per ton, and to operate said quarry as a commercial quarry and sell rock to the public at the prevailing market price during the term of the lease. Respondent also bound itself that "during the term of this lease, the existing plant of Lessee shall remain on the premises * * *."

Respondent gave notice of the termination of the lease and appellant brought an action for declaratory relief and for an injunction enjoining the removal of the existing plant of respondent from the premises. It applied for a temporary injunction to enjoin the removal of the plant which was denied.

[1] The case is controlled by the rule announced in Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, at page 168, 88 P.2d 698, 703, 89 P.2d 386, in which the court approved the holding in Anderson v. Neal Institutes Co., 37 Cal.App. 174, 173 P. 779, "that where a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced by a judicial decree."

[2, 3] The affirmative covenants to operate the property as a commercial quarry, sell to the public at prevailing rates, pay royalties to appellant, etc., fall within the rule that "courts of equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction." Long Beach Drug Co. v. United Drug Co., supra, 13 Cal.2d at page 171, 88 P.2d at page 704 and cases cited; Moklofsky v. Moklofsky, 79 Cal.App.2d 259, 262, 179 P.2d 628; 23 Cal.Jur. 480–481.

Appellant relies on Morris v. Iden, 23 Cal.App. 388, 138 P. 120. In that case a lessor was enjoined from selling a portion of the leased property. Since the lessee has a vested interest in the property leased to him (15 Cal.Jur. 600) the injunction in that case issued to protect that property interest from "irreparable damage", 23 Cal.App. 396, 138 P. 120.

In Associated Oil Co. v. Myers, 217 Cal. 297, 18 P.2d 668 and General Petroleum Corp. v. Loughead, 218 Cal. 554, 24 P.2d 457, also cited by appellant, the courts enjoined a continuing unauthorized and forbidden use of the leased property by the lessees. None of these cases is applicable to the situation here presented where the lessee has vacated the leased property and repudiated the lease.

A motion to dismiss the appeal was made by respondent which is denied. The order denying a temporary injunction is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

114 Cal.App.2d 115

LYNCH v. CITY OF LOS ANGELES et al.

Civ. 19013.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1952.

Rehearing Denied Dec. 1, 1952.

Hearing Denied Jan. 8, 1953.

Suit against city to enjoin enforcement of ordinance requiring state-licensed electrical contractors to pay an annual fee and to post a surety bond conditioned on compliance with local law as condition precedent to issuance of permits to do electrical contracting work within the city. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for plaintiff, and the city appealed. The District Court of Appeal held that the ordinance was objectionable as being in direct interference with the licensing provisions enacted by the Legislature.

Affirmed.

Municipal Corporations ⚷592(1)

Ordinance requiring state-licensed electrical contractors to pay stipulated annual fee and to post surety bond conditioned on compliance with local law as condition precedent to issuance of permits to do electrical contracting work within the city was objectionable as being in direct interference with state licensing provisions. Business and Professions Code, § 7071.5.

◆

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., James A. Doherty, Deputy City Atty., Los Angeles, for appellants.

Anderson & Anderson, Trent G. Anderson, Los Angeles, for respondent.

PER CURIAM.

This is an appeal by the City and the Chief of the Electrical Division of the Department of Building and Safety, from a judgment granting an injunction against the enforcement of City Ordinance No. 94,073, requiring state-licensed electrical contractors to pay a fee of $100 per year, and to post a surety bond conditioned on compliance with the local law, as a condition precedent to the issuance of permits to do electrical contracting work within the city.

The amended complaint recites that respondent is an electrical contractor licensed under the state Contractor's License Act, Business and Professions Code, § 7000 et seq., and that "his earnings as a contractor, 90% of which are from work done within the City of Los Angeles, are the sole means of support for himself and his family". On February 1, 1951, "respondent was refused the electrical wiring permit for which he applied by reason the fact that he had not paid permit service fees in the sum of $200.00 (for the years 1950 and 1951) and had not posted the bond required". The complaint alleges that the ordinance in question is regulatory, arbitrary, unreasonable, discriminatory and uncertain, and requires the fee to be paid regardless of whether or not certain inspections, etc. are ever made. It is alleged that the City has no power to impose such restrictions upon contractors licensed by the state. The trial court sustained respondent's contentions and found that the ordinance in question represents an attempt by the City to legislate in a field fully covered by state law.

It is appellants' contention that the ordinances in question are valid under the police power; that the amount of the permit service fee is not unreasonable in view of the number of inspections necessary, information service afforded contractors, etc.; that the $1,000 bond required, conditioned to be "paid to any person who has suffered damage by reason of the violation of any of the provisions of this Chapter", does not conflict with the general law; that the provision for collection of permit service fees is not void for uncertainty or indefiniteness, and is not regulatory in nature, but "is purely and simply a charge for services" and reasonable in amount.

Respondent's brief calls attention to the case of Agnew v. City of Los Angeles, 1952, 110 Cal.App.2d 612, 622, 623, 243 P.2d 73, 79, which involves the same issues as those presented in the instant case. In the Agnew case, as here, the lower court granted an injunction against the enforcement of Sections 93.64 and 93.65 of the Electrical Code of Los

Angeles, requiring payment of permit service fee of $100 and the posting of a $1,000 bond, the same ordinances involved in the present appeal. The reviewing court affirmed the judgment, holding that these sections "attempt to impose additional requirements in a field which is fully occupied by the general (state) law, and are unconstitutional since they conflict with the provisions of the Business and Professions Code providing for licensing and regulating contractors, by attempting to legislate upon a subject intended to be fully covered by an act of the Legislature." A motion for rehearing was denied; a petition for a hearing in the Supreme Court was likewise denied.

In appellants' reply brief, it is contended that the Agnew opinion misconstrues the previous case of City and County of San Francisco v. Boss, 83 Cal.App.2d 445, 189 P.2d 32; that "The record in this case supplies factual deficiencies noted in the Agnew case", in that the present record shows what services were offered by the City in consideration for payment of the permit service fee, and that the plaintiff herein received such services. It is also argued that the Agnew opinion "misconstrues the law relating to charges made under the police power", and that "The requirement of a bond has been inadequately considered".

The case of City and County of San Francisco v. Boss, 83 Cal.App.2d 445, 189 P.2d 32, just mentioned, held that the city could not recover unpaid city license taxes from a painting contractor who had been licensed by the state but had not obtained a certificate required by the city. Horwith v. City of Fresno, 74 Cal.App.2d 443, 168 P.2d 767, 770, also cited in the Agnew case, likewise held that the licensing of contractors by the state is a matter of general concern and not a municipal affair, and that the general law had fully occupied the field, saying: "The state license implies permission to the licensee to conduct his business at any place within the State. This permission should not be circumscribed by local authorities." In Collins v. Priest, 95 Cal.App.2d 179, 212 P.2d 269, it was similarly held that although a city may regulate sanitary matters, the imposition of additional licensing requirements upon a plumber licensed by the state, is not justified. The Agnew decision, 110 Cal.App.2d 612, 243 P.2d 73, correctly followed these cases, and such holding is clearly applicable to the present appeal.

As said in the Agnew opinion, "Section 93.64 compels a state-licensed contractor to *register* with the electrical division of the Department of Building and Safety before he may obtain a permit for electrical installations and wiring in the city. * * * An application for a certificate of registration must be made in writing to the Board of Building and Safety Commissioners. § 93.571. The Commissioners, prior to the issuance of the certificate of registration, shall briefly examine the applicant and pass upon his qualifications and experience. * * * A certificate of registration may be suspended or revoked for specified reasons. § 93.578."

The following quotation therefrom, Agnew v. City, 110 Cal.App.2d 612, 619, 243 P.2d 73, 77, may likewise be noted, apropos the present appeal: "Sections 93.64 and 93.65 of the Los Angeles ordinance were enacted shortly after the decision in the Boss case, 83 Cal.App.2d 445, 189 P.2d 32. We think it apparent that they are an attempt, under the guise of regulating the quality and character of installations and the exercise of the power of inspections and permits, to do what the Horwith and Boss decisions say cannot be done. * * * In enacting section 93.64 all that the city did, in effect, was to change the words 'registration fee' in section 93.573 to 'permit service fee,' and to add that the $100 shall be used to defray expenses. * * * Section 93.65 [requiring a bond] is identical with section 93.572."

It is fundamental that a mere change in terminology, leaving the situation substantially the same, is of no material importance. As in other cases, the courts are empowered to go beneath the surface, and disregarding any camouflage of language, determine the real nature of the controls imposed. In the present case it seems clear that the attempted municipal regulation is in direct interference with the licensing provisions enacted by the legislature.

Appellants maintain that "The record in this case supplies factual deficiencies noted in the Agnew case", in that evidence here shows what the "services" are that are mentioned in Section 93.64 providing that an electrical contractor shall register and pay "a permit service fee of $100.00 to defray expenses of miscellaneous inspections, reinspections and other services not specifically mentioned"; that the respondent having been the recipient of such services could not claim "that he had received no benefit for the fee charged"; and that it would be presumed that the fees charged were reasonable.

The respondent's brief, however, calls attention to the testimony of appellant Tansey, Chief of the Electrical Division, that the amount of the $100 fee was arrived at by considering the fact that the department was "in the red" $100,000, and "multiplied the number of contractors by a hundred dollars and concluded that $80,000.00 would at least partly offset the deficit". While that was not the only element considered, "We just simply lumped that one and let it go in on the basis of a hundred dollars". This testimony, says the respondent, "makes it very clear that the permit service fee was a plain, arbitrary improvisation to obtain a certain additional amount of money, having no relation to any services rendered". The fee required was the same for one month or one day, or one year, and was not one "imposed for the purpose of defraying the expenses incidental to the services in fact rendered and approximately commensurate with such expenses".

In respect to the city's requirement that a state licensed electrical contractor must post a bond before being permitted to do electrical work in the city, this is likewise a regulatory measure which to that extent nullifies the permission given by the state to conduct such business at any place within the state. The state law requires a bond only for reinstatement of a contractor. Business and Professions Code, § 7071.5.

To finally sum up the matter in its legal aspect, appellants' argument tends to give first place to municipal regulatory powers and subjects state control to municipal limitation. This theory of operation is directly contrary to the well established rule, and should not be sanctioned either under so-called police power or otherwise. Nor should a contractor who has been duly licensed by the state be placed in such a confused and burdensome position.

As said in the Agnew case, 110 Cal.App. 2d at page 616, 243 P.2d at page 75, "The intent of the Legislature in adopting the general scheme for the licensing and regulation of contractors is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. It was clearly the intention of the Legislature to declare that the licensing and regulation of contractors by the state shall be the only licensing and regulation in the state. This does not limit the right of a city or county to protect life and property by the enforcement of local regulations as to character and quality of electrical installations. Bus. & Prof. Code, § 7110."

The ordinance regulations here under discussion requiring payment of the so-called "permit service fee" and the posting of a bond, are clearly objectionable as an attempt "to legislate upon a subject intended to be fully covered by an act of the legislature". No merit is discovered in any of the appellants' contentions.

The judgment is affirmed.

In re JAMISON'S Estate.

JAMISON v. JOHNSON et al.*

Civ. 18730.

District Court of Appeal, Second District,
Division 1, California.

Nov. 10, 1952.

Rehearing Denied Dec. 1, 1952.

Hearing Granted Jan. 8, 1953.

Will contest, wherein the Superior Court, Los Angeles County, John Gee Clark, J., admitted the holographic will to probate, and the contestants appealed. The District Court of Appeal, Drapeau, J., sustained the trial court's findings but modified the wording of the judgment so as to give effect to the intent and purpose of the trial court.

Modified and affirmed.

1. Wills 🔑326, 327

In will contest, as in other forms of litigation, determination as to whether nonsuit or directed verdict may be granted is to be made by reviewing entire evidence presented from point most favorable to contestants, disregarding all contradictory evidence.

2. Wills 🔑324(3)

Contestant's evidence was insufficient to raise inference of undue influence attending execution of holographic will. Probate Code, § 53.

3. Wills 🔑155(1)

However unnatural or unjust a will may appear to be, and however much at variance with expressions by testator concerning relatives or natural objects of his bounty, testamentary document may not be held invalid on ground of undue influence unless there be showing of some sort of pressure which overpowered mind and mastered volition of testator at very moment of execution.

4. Wills 🔑386

When attack is made upon verdict rendered in will contest on ground that it is not supported by substantial evidence, province of appellate tribunal is same as in other civil cases, that is, it begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury, and when two or more inferences can reasonably be deduced from facts, reviewing court is not authorized to substitute its deductions for those of triers of facts.

5. Wills 🔑37

Even insane person may make will during lucid intervals if facts disclose required elements of capacity at time in question.

6. Wills 🔑45, 47

Feeble health, disease, age and infirmity do not establish testamentary incapacity unless condition is such at time of executing will that testator is unable to understand nature and situation of property and disposition thereof intelligently.

7. Wills 🔑52(1)

Presumptively, testator was of sound mind at time of executing will, and burden is upon contestants to show affirmatively and by preponderance of evidence incapacity which affected disposition of property.

8. Wills 🔑55(1)

Evidence sustained finding that testator had been possessed of mental capacity to make testamentary disposition.

9. Wills 🔑50

A testator is of sound and disposing mind and memory if, at time of making his will, he has sufficient mental capacity to be able to understand nature of act he is doing, to understand and recollect nature and situation of his property, and remember and understand his relations to the persons who have claims upon his bounty, and whose interests are affected by provisions of the instrument.

10. Wills 🔑390

Where there was no doubt as to intent and purpose of trial court to admit will to probate, its judgment would be modified to state that will was entitled to be and was admitted to probate. Probate Code, §§ 373, 1232; Rules on Appeal, rule 26(a).

◆

Edward Alton, Frank M. Sturgis, Beverly Hills, and Thomas B. Sawyer, San Pedro, for appellant Katherine H. Jamison.

Allan F. Bullard, San Pedro, for appellant minors.

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* Subsequent opinion 256 P.2d 984.

Frederick W. Mahl, Jr., Los Angeles, for the other appellants.

Church, Church & Howard, Los Angeles, for respondent.

DRAPEAU, Justice.

Arthur C. Jamison died on February 11, 1950, at the age of eighty-three years. His son, Chancey B. Jamison, presented for probate a holographic will dated December 31, 1949, to-wit:

> "Dec. 31–49
>
> "I hereby revoke all past wills—codicils by me made—declare this is my last will—I give all my properties to my four heirs as follows—

Lea Patterson	2%
Frances Johnson	5%
Chance Jamison	85%
Louise Jamison	8%

> "I appoint Chance Jamison as Executor of my will without bond
>
> A. C. Jamison"

California Trust Company also offered for probate a witnessed will prepared and dated May 17, 1948.

The sole surviving heirs were the two daughters, Leanore Patterson and Frances Johnson; the son, Chancey B. Jamison, and Louise Jamison, the widow. Testator's first wife and the mother of the three children died December 31, 1945.

By the terms of the witnessed will, testator bequeathed $5,000 each to his daughters, his son and his brother Roy; $15,000 to his widow, Louise; $50,000 to Katherine H. Jamison (the divorced wife of his son); and the residue of his estate to his grandchildren. California Trust Company was named executor. The beneficiaries under that will, with the exception of the widow and Jeanne Jones, filed written opposition to the probate of the holographic will of December 31, 1949.

Grounds of the contest were: (1) the will was not executed by testator; (2) it was not executed with the required formality; (3) undue influence was exerted upon testator by his son; and (4) testator was mentally incompetent to execute a will.

At the close of contestants' case, the trial court granted proponent's motion for nonsuit as to all grounds "except as to the sole issue of competency."

After a thirty-day trial resulting in over two thousand pages of reporter's transcript, the court found that testator was of sound and disposing mind when he executed the holographic will of December 31, 1949. Thereafter contestants' motion for a new trial was denied. This appeal is from the judgment that "said will is entitled to be admitted to probate", and denying petition for probate of the prior witnessed will.

It is here urged by appellants that (1) the court erred in granting proponent's motion for nonsuit on the issue of undue influence; (2) the finding of capacity is not supported by the evidence; (3) the court erred in granting costs; and (4) the court erred in failing to comply with section 373 of the Probate Code.

The record discloses that Arthur C. Jamison was a self-made man of Scotch descent, who died on February 11, 1950, at the age of 83 years. He left an estate which had a stipulated value on October 2, 1950, of $237,000. He was a strong-willed and dominating type of person with a definite mind of his own and not easily influenced by others. He lived in Spokane, Washington, when his children were young. He moved to Los Angeles and from 1921 until his death lived in his home at 818 Rimpau Boulevard. He was retired from active business for many years. He placed great importance on the family as a unit. He loved his grandchildren and took them on trips and showed great interest in their education and development. His principal interest outside of his family was that of investments in stocks and securities. He studied financial statements of the companies in which he held stock and followed the business of his son-in-law, Frank Johnson, the Van Camp Insurance Agency. He was also interested in the Van Camp Sea Food Company largely controlled by Mr. Johnson's stepfather.

Testator was first married to Frances Jamison, usually called "Fan" or "Nanny". She was the mother of their three children, Chance, Leanore and Frances, and died December 31, 1945. In 1948, he married Louise Jamison, who survived him. He deeded his home to her and Katherine H. Jamison (the divorced wife of Chance) during the last year of his life, and left Louise $15,000 in the will of 1948. Most of the family parties throughout the years, especially at Thanksgiving, and Christmas, were held in testator's home. After his first wife's death he refused to leave his home and move to a hotel, because he wanted a place where he could have "all of the children around him" and where he could see the "babies."

Chance was away from home during the early years. However, when his father told him he was "running around too much and not standing still long enough to make any money", Chance went into the lumber business and had been so engaged for a period of ten years.

Testator became ill in May of 1949, and from May 20 until August 9, 1949, he was a patient in the California Lutheran Hospital. Thereafter he had 24-hour nursing care in his home until his death the following February 11th. He suffered from generalized arteriosclerosis, severe anemia and senile dementia; his condition became progressively worse from the time he entered the hospital until his death. Blood transfusions were administered continuously during this period. He frequently was disoriented as to time and place, and did not always recognize people.

After the onset of testator's illness, the relationship between himself and his son became closer. Chance visited him often, took him for automobile rides, played cards with him and sought to comfort him during his last illness. Contestants were also daily visitors both in the hospital and at the family home.

[1] On the question of the propriety of an order granting a nonsuit, the following appears in Estate of Ridgway, 92 Cal.App. 2d 325, 328, 206 P.2d 892, 894: "* * * the rule in this state is set forth in Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579, 580, as follows: 'A non-suit or directed verdict may be granted "only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from the evidence,* the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given."' The foregoing means that the conflict, or the fact that there is a conflict, must be disregarded. The rule is as applicable in will contests as it is in other forms of litigation. Estate of Ricks, 160 Cal. 450, 117 P. 532. (Emphasis included.) * * * In reference to the matter of undue influence, it is said in Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25, 27, '"The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person * * * unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.'" Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876.' * * * Although it is true, as argued in appellants' brief, that undue influence may be established by indirect and circumstantial evidence, such proof, whether direct or circumstantial, must be of a substantial nature;—conjecture will not suffice."

And in Estate of Llewellyn, 83 Cal.App. 2d 534, 562, 189 P.2d 822, 839, 191 P.2d 419, this court held that "Before there is imposed upon the proponent of a will the obligation of presenting evidence of volition, and before the question as to undue influence becomes one of fact for determination by a jury, there must be evidence, the probative force of which establishes (1) the relations between the one charged with exercising the undue influence and the decedent affording the former an opportunity to control the testamentary act; (2) that the decedent's condition was such as to permit of a subversion of his freedom of will; (3) that there was activity on the part of the person charged with exercising undue influence; and (4) that such person unduly profited as beneficiary under the will. Estate of Graves, 202 Cal. 258, 262, 259 P. 935; Estate of Hampton, 39 Cal.App.2d 488, 498, 103 P.2d 611. It is also the law that evidence must be produced that pressure was brought to bear directly upon the testamentary act. Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25."

Proponent took the stand and testified that the document dated December 31, 1949, heretofore set out in full, was entirely written, dated and signed in the handwriting of his father, Arthur C. Jamison, deceased; that in his opinion, testator was of sound mind on that date and was not acting under the undue influence of any person.

Under cross-examination by contestants, Chance Jamison testified that he saw the will for the first time when his father handed it to him on February 7, 1950, under the following circumstances:

> "I told him I was going to leave and he said, 'Keep your shirt on.' He said, 'Come back here.' He said, 'Sit down here. I am going to talk to you. Sit down on the edge of the divan.' * * * I sat down there and he said, 'I'm all through. I won't be here much longer.' And he said, 'Here,' and he handed me the will, and he said, 'Don't show this to anybody until after my death.'
>
> "Q. And he told you it was his will? A. No, he didn't. * * * Q. Did you have any idea what this paper was? A. No, I didn't. Q. Was your father in the habit of handing you papers? A. Yes. He handed me a lot of them. * * * He handed me papers every day or two, financial statements of stocks, and wanted me to read them."

Proponent further testified that he looked at the paper when he got home but "never had a chance" to discuss it thereafter with his father, who died four days later.

To the question: "Mr. Jamison, to your knowledge was there anyone present when the will of December 31 was written?", proponent replied: "All I know about that will is that I didn't ask him to write it and I don't know when he wrote it, and I didn't see him write it, and I didn't know anything about it until February 7. Q. The question was: Was anyone present at the time, so far as you know? * * * When the will was written? A. I don't know when it was written, I told you. I never saw him write it. I never asked him to write it, and I never saw the will until February 7. * * * Q. By Mr. Bullard: Do you know of anyone who was present, other than your father, when the will was written? A. No."

Other than the foregoing, no evidence was offered by either proponent or contestants as to how or where the will was prepared.

An examination of the document itself reveals that the handwriting is firm and legible. It contains the essential requirements for a valid holographic will. Sec. 53, Probate Code. Testator (1) declared it was his will; (2) revoked all prior wills and codicils; (3) disposed of his entire estate to his four heirs by name, who were the natural objects of his bounty, designating the percentage that each should receive; (4) appointed an executor to serve without bond; and (5) dated and signed the document.

In granting the motion for nonsuit, the trial court commented that "Conjecture and surmise, as I have indicated, will not take the place of positive proof, and, therefore, so far as the proof is concerned, there was no prior activity in securing the execution of this particular will."

[2] However, appellants assert that activity of respondent in the preparation of the will could be inferred from circumstantial evidence presented by them, and that they were entitled to have the issue of undue influence submitted to the trier of fact. The trial court decided at the close of their case, that contestants' evidence was insufficient to raise that inference. This court is of the opinion that such ruling was proper.

Witnesses for appellants testified that testator was in an advanced stage of senile dementia; that on September 10, 1949, he had a generalized arteriosclerosis with diminution of the blood flow to the brain; secondary anemia and a weak heart. When he was taken to the hospital he changed from an autocrat to a man of complete docility; he made no objection to signing a petition for appointment of a guardian, and within a few days signed one nominating his wife as guardian of his person, a second nominating his daughter Frances, and then a third, again naming his wife. He lost his memory for recent events, was confused about his surroundings, failed to recognize members of his family, his doctor and his lawyer.

Appellants also emphasize the fact that it was not until testator's last illness that proponent took any interest in his father's affairs. They introduced evidence that testator had "no use for Chance"; that Chance was no friend of his because he had reported him for violation of income tax; and that he told his granddaughter Patricia Dunne that Chance "wasn't any good."

Appellants urge that the following incidents support an inference that proponent was active in the preparation of the will of December 31, 1949:

The testimony of Mrs. Frances Johnson that sometime in May of 1949, she had a conversation with her brother Chance regarding the witnessed will of May, 1948, to-wit: "I told him that my Uncle Clare had been down, and said that he had seen the will, and that Louise was in for $15,000, Katherine for $50,000, and he also told us what my sister and my brother and I were in the will for, and also the grandchildren were to have the rest. * * * He (Chance) said he still didn't believe any of it, although he knew he was in it for peanuts and that he was going to break the will." Also, around August 1, 1949, at a meeting in attorney Arkoff's office at which she was present, Chance inquired: "If we can get him (testator) to sign for my sister as his physical guardian, could we also get him to make a new will?" Shortly after this, the witness and her brother Chance visited their father in the California Hospital, at which time Chance showed her a will in his handwriting and said: " 'Do you think he (testator) will sign this?' And I said, 'I don't know', and he handed it to my father, and my father read it and said, 'Put it over there. I will think about it.' My brother put it back in his pocket." Again in September, while the witness and her brother were talking to their father at his home, Chance took the same paper out of his pocket and handed it to the testator, who read it and said: "Leave it and I will show it to Louise."

Both this witness and her mother-in-law, Mrs. Van Camp, testified that on January 12, 1950, while visiting with testator, who was sitting up in a chair in the living room of his home, Chance Jamison said: "Dad, you said if I would get the girls Leanore and Frances down here, you would make a new will." To this testator replied: "I didn't say anything of the sort. * * * Who is Leanore?"

It should here be pointed out that both Leanore and Frances disapproved of their father deeding his home to Katherine and Louise, as well as of his legacy of $50,000 to Katherine, and had discussed these matters with their brother. Also, that the conversation of January 12, 1950, occurring as it did after the holographic will here in question was executed, corroborates the testimony of Chance Jamison that he knew nothing of that will until his father handed it to him on February 7, 1950.

From our examination of the voluminous record, we are convinced that contestants' testimony raised nothing more than a mere suspicion that respondent had anything to do with the will of December 31, 1949.

[3] As stated in Estate of Rabinowitz, 58 Cal.App.2d 106, 111, 135 P.2d 579, 582: "By an unbroken line of authorities in this state, it is firmly established that however unnatural or unjust a will may appear to be, and however much at variance with expressions by the testator concerning relatives or the natural objects of his bounty, the testamentary document may not be held invalid on the ground of undue influence unless there be a showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution." No such showing has been made in this case.

Appellants next urge that the finding of capacity is not supported by the evidence, because:

1. The medical testimony shows lack of capacity;

2. The testimony of nurses and others corroborates the medical diagnosis;

3. The will itself indicates that testator lacked capacity because testator named his son executor "without bond", and omitted his grandchildren from the will.

[4] "When an attack is made upon a verdict rendered in a will contest on the ground that it is not supported by substantial evidence, the province of an appellate tribunal is the same as in any other civil case. And the power of a reviewing court 'begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, a reviewing court is not authorized to substitute its deductions for those of the triers of fact'. Estate of Russell, 80 Cal.App.2d 711, 715, 182 P.2d 318." Estate of Llewellyn, 83 Cal.App.2d 534, 543, 189 P.2d 822, 827, 191 P.2d 419.

Dr. Clarence H. Nelson lived next door to testator and met him socially in 1942; he testified that he first saw testator professionally in 1946 or 1947. Mr. Jamison was ill about a week before the witness was able to persuade him to go to the hospital on May 20, 1949. The patient was then suffering from generalized arteriosclerosis, severe anemia and senile dementia, a progressive disease. He was confused, disoriented as to his surroundings, as to place and time; very forgetful; read the paper upside down. The doctor did not recall December 31, 1949, "as a specific night that I saw him", but did not believe that the patient was of sound mind on that date, or that he knew the nature and situation of his property; that he was not capable of adding the figures 8-85-2 and 5 correctly. On cross-examination, this witness stated he had no recollection as to how the patient was on December 31; and to the question: "Now the actions and personality of a person with senile dementia vary from time to time, do they not?", he replied: "Yes, they can. He might be good one day and not so good the next day. He can go from bad to worse and back again to bad." When asked the effect of a blood transfusion upon the patient, the witness stated: "The effect was both good and bad. Sometimes we would give him a transfusion, and that evening and the next day he would be terrible. He would be very much worse, physically and mentally, and at times he was taken to his bed, and again he would have a transfusion, and it seemed to give him a physical lift. He felt better. * * * He seemed to be happier after a transfusion. Q. One of the results of a transfusion would be to furnish more blood and oxygen to the brain cells? A. Yes, it was. Q. And senile dementia is a disease in which there is a lack of nourishment to the brain cells? A. That is right. Q. So that the natural result of a transfusion would be to nourish those brain cells and have a beneficial effect upon his brain as well as the rest of his body, would it not? A. Yes, theoretically, it would." This witness did not see Mr. Jamison on January 1 or 2, but he did consent to let him take an automobile ride to San Pedro after Christmas of 1949, and saw him watching television around that time. It was stipulated that Mr. Jamison had a blood transfusion on December 26, 1949, at 4:05 p. m.

Dr. Garfield S. Barnett, who saw testator on September 9, 1949, for about two and one-half hours while giving him a blood transfusion, testified that "At the time I saw him he was definitely disoriented. He was childish in behavior and confused, and therefore I would say that he was not of sound mind at the time I saw him."

Dr. Robert L. Wiley spent between 35 and 40 hours with testator between April 22, 1949, and February 10, 1950; administered eleven blood transfusions from August 25, 1949, to January 1, 1950. He testified that he "held him even" during this entire period of time by increasing the number of transfusions; that he saw testator on December 26, 1949, and on January 5, 1950, and that "he most certainly wasn't of sound mind on those dates." He did not see the patient on December 31st, but he felt that he did not return to normalcy subsequent to December 26th, "because my impression of an unsound mind is based on an irreversible change in his mind and circulation and in light of that I couldn't very well say that he would return briefly. * * * I don't believe he was of sound mind on December 31." However, this witness stated that there was invariably a slight improvement in the patient's condition as result of a transfusion; that he was a little brighter and could enunciate more clearly.

Dr. Orville O. Witherbee saw testator eight times between August 8 and September 10, 1949, during Dr. Nelson's vacation. He testified that Mr. Jamison suffered severe anemia requiring transfusions every six or seven days; that he was considerably underweight, malnourished and quite weak; suffered from advanced senile dementia; his memory for recent events was very poor, and he never recognized the doctor by name, always asking "Who is that fellow?" To the question: "Doctor, during this period you were attending Mr. Jamison, did you form any opinion as to about how long you thought he would live, in view of the circumstances as you found them to be?" the witness replied: "Yes, I did. I was completely astounded as to his length of life. I saw him in August of 1949, and I was firmly convinced in my own mind that if he lived two weeks, that would be something, and I didn't see how he could, and I understand that he lived several months." He gave as his opinion that Mr. Jamison did not have sufficient mental capacity on December 31, 1949, to know that he was making a will.

With the exception of Dr. Nelson, none of these doctors saw testator on December 31st, and their opinions were arrived at by an evaluation of his physical condition from a medical standpoint. While all testified that senile dementia is a progressive disease from which there is no turning back, they admitted that his condition varied and that testator was better after he was given a blood transfusion.

[5] And, as stated in Estate of Worrall, 53 Cal.App.2d 243, 246, 127 P.2d 593, 595: "Even an insane person may make a will during lucid intervals if the facts disclose the required elements of capacity at the time in question."

Upon his return from the hospital on *August 9, 1949*, until his death, testator had three nurses—Hastings, Taylor and Thomas—on twenty-four hour duty. Their charts reveal that throughout this period their patient was restless, confused, talked in his sleep, was very feeble, too weak to walk, asked for a cigar and could not smoke it; thought he was in a hotel; wanted to go home; mumbled and was incoherent; was inclined to tip over backwards; acted very vague but fairly strong on feet; yelled to get up out of bed; irrational; mind cloudy, talked constantly. These records also show that testator was alert, was quiet, smoked cigar without any trouble, enjoyed television. Late in *October* he was smoking, reading paper, asked about a statement he had read, played the piano, looked for letters and walked in the garden. On *December 20th* he watched pictures with family. On *December 24th* the family was visiting him. At 7:00 p. m. he asked to go to bed with help of nurse and son, and after he got to bed he smoked a cigar and spoke to several of his children and grandchildren. On *February 8th*, he "spoke at times, could understand him but only a whisper."

The chart for *December 31, 1949*, notes a big breakfast at 8:30 a. m. Temperature 98, pulse 70, respiration 22. At 11:00 a. m. grapefruit juice and whiskey; 12:30 p. m., shaved, bath, alcohol rub; 1:00 p. m., milk and whiskey; 1:30, out for a ride; 3:00 Nurse Taylor off duty and Nurse Hastings on, patient in chair; 3:30 resting on couch, egg nog and whiskey; 4:30 to bathroom; 6:00 dinner; 6:30 reading paper; 7:00 Dr. Nelson visited patient; 8:00 son and wife here; 9:00 egg nog and whiskey; 10:00 patient asleep. *Jan. 1, 1950* 12:30 a. m. Milk and whiskey; 3:00 same—coughing at intervals; 6:00 juice; 6:15

alcohol rub; 7:00 asleep; 8:00 breakfast; 12:00 noon, milk and whiskey, partial bath; 1:30 p. m. patient lying down; 3:15 Mrs. K. Jamison here; 3:30, son and wife here; 4:00 egg nog (no whiskey); 6:00 dinner, ate very well; 7:00 television; 8:00 egg nog and whiskey; 8:15 bathroom; 9:00 coughing; 10:00 asleep; 11:00 asleep; Hastings off and Thomas on duty. *Jan. 2, 1950*: 1:00 a. m. milk and whiskey—coughing a little; 6:00 juice and alcohol rub; 7:00 resting more comfortably. Thomas off and Taylor on duty. 7:45 breakfast; 10:00 listening to television; Rose Parade; fruit juice; 12:30 p. m. egg nog, bath, alcohol rub, shaved; 1:00 ice cream; 2:00 watching ball game; 3:00 same; Taylor off and Hastings on duty; 4:00 oxygen—egg nog—to bed; son and wife here and others. 4:45 patient sleeping soundly; 5:15 awake; 6:00 dinner; 6:30 television—smoking. 7:30 Buddy Patterson and wife here; 8:30 egg nog; 9:30 bathroom; 10:00 coughing hard at times; 10:30 asleep; 11:00 Hastings off and Thomas on duty. 11:30 coughing—changed position—more comfortable.

Read as a whole these charts disclose that testator led a reasonably normal life for a man 83 years of age, and that his mental and physical condition varied from day to day.

Nurse Hastings testified that in her opinion testator was of unsound mind on December 31, 1949; that shortly after she came on duty that day, testator's eyes were "vacant"; he looked "dopey" and she believed opiates had been given to him.

Various members of testator's family testified that although they visited him regularly, he never spoke to them or called them by name; was forgetful, could not remember anything; lost interest in the stock market; denied he had deeded his home to his wife and Katherine Jamison; was afraid he was running out of money; was confused and completely disoriented. The widow, testator's attorney, Mrs. Bayard, a neighbor, Katherine Jamison, his granddaughters, Jean Patterson Curtis and Jeanne Jamison Jones, Mrs. Van Camp were all of the opinion that testator was not of sound mind on December 31, 1949.

On the other hand, Nurse Agnes Taylor took the stand and testified with respect to events occurring on December 31st, as follows: When she arrived at 7:00 a. m. testator was asleep in bed. Around 9:00 he arose and had breakfast with his wife in the breakfast room. While they were eating, Mrs. Jamison's son-in-law and grandson from Ohio, William and Weston Gardner, arrived. They were introduced to testator, who asked why they were in Los Angeles. Mr. Gardner replied that they had come to see the Rose Bowl Game and Mr. Jamison said he planned to watch it on television. The Gardners were going to San Diego for the day and wanted Mrs. Jamison to go along, if testator approved. He did and said he was glad that she could go. He asked where the Gardners were staying. After breakfast, testator joined the Gardners, Louise Jamison and Mrs. Taylor in the living room for about half an hour. Mrs. Jamison and the Gardners left about 10:00 a. m.

Chance Jamison and his wife, Esther, arrived about noon. Testator expressed regret that they did not come earlier to meet Louise's relatives; said that they were fine looking people and had taken Louise to San Diego for the day. Testator then asked Chance to take him for a ride. Chance asked where he would like to go. Testator said he would like to drive around the neighborhood a little, then out Wilshire Boulevard so he could see the church that was being built. Mr. Jamison, Chance, Esther and the witness Taylor left the house about 1:30 p. m. They rode around the neighborhood for several blocks to see the houses of people Mr. Jamison had known in prior years. Mr. Jamison said he wanted to see the Christmas decorations. They then drove out Wilshire Boulevard and stopped at the Carnation building where they parked and had ice cream cones. From there testator said he wanted to go up in the Hollywood Hills to see the house where his brother used to live, and directed Chance how to get there. They then drove down Hollywood Boulevard to see the decorations. Testator commented that he didn't think they were as pretty as they had been the previous year. They arrived home at

3:00 p. m. Nurse Taylor left and Nurse Hastings came on duty.

Mrs. Esther Jamison testified that when they arrived home, testator said he would like some of the good muffins she used to make. She couldn't find any muffin tins in the kitchen, so she and Chance went to Ralphs' Market and bought some muffins. When they returned testator was in his bedroom and they left around four thirty. When they returned to the house about seven o'clock, they found testator sitting in an easy chair in the living room. He mentioned that Louise had not yet returned from San Diego and had not telephoned. Chance told him not to worry that she would be along. Testator said, "What about a game of cards?" Chance set up a bridge table and they started to play a three-handed game of rummy. Shortly after eight o'clock, Louise and Mr. Gardner came in. Louise said they had had a marvelous time, and Mr. Jamison said, "Well, where were you?" Louise replied, "We stopped at Victor Hugo's in Laguna and had dinner." Chance and Esther left about eight thirty.

Mrs. Alcorn, testator's next door neighbor, testified that she saw him almost every day for five years including December 31, 1949. She gave her reason for believing he was of sound mind on that day, "Because he greeted me when I went over there, and he told me that he was being taken on an automobile ride by his son Chancey." Further, she believed he was of sound mind on January 2, 1950, "Because he was sitting watching the television and making comments to me about the Rose Parade."

The following statement by this court in Estate of Llewellyn, 83 Cal.App.2d 534, 553, 189 P.2d 822, 833, 191 P.2d 419, quoting from Estate of Russell, 80 Cal.App.2d 711, 719, 182 P.2d 318, appears particularly applicable here:

> [6, 7] "While in the instant case, the testatrix was in feeble health, suffering from disease, aged and infirm, these facts are not sufficient of themselves to establish testamentary incapacity unless it be shown by a preponderance of the evidence that her condition of mind and body *at the time of the execution of the will* was such that she was unable to understand the nature and situation of her property and the disposing of it intelligently. In other words, it must be shown that her weakened and enfeebled condition had a direct influence upon the testamentary act. Section 20 of the Probate Code empowers every person of sound mind, over the age of 18 years, to dispose of his separate property by will. And the property being his to dispose of as he wills, he is not called upon to consult or satisfy the wishes or views of juries or courts. The presumption is always that a person was of 'sound mind' at the time of execution of his will, and the burden therefore always rests upon the contestants to show affirmatively and by a preponderance of the evidence, the incapacity of the testator and the further fact that, because of the mental or bodily infirmities with which the testator was afflicted, he devised or bequeathed his property in a way which, except for the existence of the aforesaid infirmities, he would not have done." (Emphasis included.)

[8] A minute examination of the entire record, from which the foregoing brief résumé has been extracted, convinces us that the trial court's finding of testator's competency to execute the will in question is supported by substantial evidence.

[9] "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument." Estate of Arnold, 16 Cal.2d 573, 586, 107 P.2d 25, 32.

The will itself is mute, but convincing evidence of testator's competency. It cannot be denominated unnatural just because testator left to his only son a larger amount than he left to his daughters and the widow.

It was stipulated that decedent's records showed payments by him to the various members of his family during the period from May 8, 1929, to May 3, 1949, as follows:

Patterson Family	$ 1,740.00
Leanore Patterson	70,196.40
Robert Patterson	3,517.50
Robert Patterson, Jr.	5,838.05
Jean Curtis	3,956.40
Patricia Patterson Dunne	5,807.40
Virginia Patterson McClintock	6,899.07
Frances Johnson (stock)	1,134.75
(money)	3,051.00
Franklin Johnson (stock)	1,723.07
(money)	900.00
Jeanne Jamison Jones	6,254.05
Katherine H. Jamison	1,500.00
½ int. in house valued at	11,575.00
Louise Jamison ½ int. in house	11,575.00
Clare Jamison	800.00
Roy Jamison	6,900.00

Apparently no gifts were made to the son.

On the question of costs, section 1232 of the Probate Code provides that "When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require."

Rule 26(a) of Rules on Appeal provides: "Except as hereinafter provided, the prevailing party shall be entitled to his costs on appeal as an incident to the judgment on appeal. * * * In probate cases, in the absence of an express direction for costs by the reviewing court, costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom such award shall be made." See, also, Estate of Williams, 110 Cal.App.2d 50, 53, 242 P.2d 26. Hence, the allowance of costs to respondent was proper.

Appellants finally urge that the trial court erred in its failure to comply with the terms of section 373, Probate Code, to-wit: "* * * or upon the proof taken if a jury is waived, the court must render judgment, either admitting the will to probate or rejecting it."

It is contended that by the judgment reciting "that said will is entitled to be admitted to probate as such", the court "did neither admit nor reject the will."

This court in its denial of respondent's motion to dismiss this appeal held that "it is self-evident that uncontested wills are to be admitted or rejected by way of 'orders' and that contested wills are to be admitted or rejected, not by orders but by judgments." Estate of Jamison, 107 Cal. App.2d 483, 486, 237 P.2d 546, 548.

The Probate File transferred to this court as an exhibit on appeal, contains an "Order Admitting Will to Probate and for Letters Testamentary" which was signed and filed contemporaneously with the judgment above mentioned. The order reads as follows:

> "It is ordered and adjudged by the court that said Arthur C. Jamison, also known as A. C. Jamison, died on the 11th day of February, 1950, a resident of Los Angeles County, State of California, leaving an estate in Los Angeles County, California, and *that the document* heretofore filed *purporting to be his last Will* and so alleged to be in said petition, *be admitted to probate as the last Will of said deceased;* that Chancey B. Jamison, also known as Chance Jamison, be appointed Executor of said last Will, and that Letters Testamentary be issued to said Chancey B. Jamison, also known as Chance Jamison, without bond, upon his taking the oath required by law." (Emphasis added.)

Moreover, the trial court found that the will here in question was a valid holographic will and that testator was competent in all respects to execute it. And concluded that the will was entitled to be admitted to probate. There is no doubt that it was the intent and purpose of the trial court when the judgment was signed to admit the will to probate.

[10] Accordingly, the last line of paragraph numbered 1, on page 2 of the judg-

ment is hereby modified to read: "said Will is entitled to be *and it is* admitted to probate as such."

As so modified, the judgment is affirmed; each party to bear his own costs on appeal.

WHITE, P. J., and DORAN, J., concur.

HERZOG et al. v. GROSSO et al.*

Civ. 19055.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1952.

Rehearing Denied Nov. 24, 1952.

Hearing Granted Jan. 5, 1953.

Action to quiet title to an easement for road purposes over defendant spouses' land, recover damages caused by defendant husband's acts in increasing the downgrade of the roadway from a highway to plaintiffs' residence property by dumping dirt, rocks, etc., on part of the road, and enjoin defendants from asserting any claim in the easement. From a judgment of the Superior Court of Los Angeles County, Philbrick McCoy, J., for plaintiffs, defendants appealed. The District Court of Appeal, Vallée, J., held that a provision of the judgment imposing on defendants the expense of altering and constructing part of the road to conform to a plan shown on a private street map was erroneous as allowing double recovery as to the part of the damages awarded for the injury caused by the condition of such part of the road, but not ground for reversal of the judgment, in view of the court's finding on sufficient evidence that the nuisance created by defendants was permanent.

Judgment modified and affirmed as modified.

See also Cal.App., 249 P.2d 876.

1. Damages 🔑110

The Superior Court's award of amount of permanent depreciation in value of land because of adjoining landowner's acts in increasing downgrade of road over his land from highway to residence property of owners of other land as damages for permanent injury thereto by such interference with their easement in roadway was proper as against contention that restoration of road to its former condition by removing dirt, rocks, etc., deposited on part thereof by adjoining landowner, would cost considerably less than amount awarded, in absence of evidence of such cost or offer by adjoining landowners to remove materials and restore road to former condition.

2. Damages 🔑53

A person may be entitled to recover for a feeling of anxiety for himself or others as element of damages for a tort, if such anxiety was expectable result of tortious act or tort-feasor intended such result.

3. Damages 🔑53

The Superior Court's award to landowners of damages for worry, nervousness and mental distress for safety of themselves, their daughter, and others obliged to use road, in which such owners had easement, over adjoining land, as result of acts of owner thereof in increasing downgrade of roadway, leading from highway to residence property of owners awarded damages, by dumping dirt, rocks, etc., on portion of road, thereby forcing such owners, their daughter and others to drive over newly filled ground near edge of steep embankment, was not error.

4. Highways 🔑18

The word "road," in its common as well as legal acceptation, applies to open and unobstructed road, unless qualified by some other word, like adjective "private", and is of greater significance than term "way."

See publication Words and Phrases, for other judicial constructions and definitions of "Road".

5. Easements 🔑44(1)

The extent of rights and duties of owners of land and easement in road over it toward each other must be determined by language of grant of easement and all circumstances existing when grant was made.

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* Subsequent opinion 259 P.2d 429.

6. Easements ⚿40

Nothing passes as incident to grant of easement but that which is necessary for its reasonable and proper enjoyment.

7. Easements ⚿44(1)

What is necessary for reasonable and proper enjoyment of easement in way and limitations imposed thereby on use of servient land by proprietor thereof depend on terms of grant of easement, purposes for which it was made, nature and situation of property subject thereto, and manner in which way has been used and occupied.

8. Easements ⚿61(9)

In action to quiet title to easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land, recover damages for interference with easement, and enjoin defendants from asserting any claim therein, evidence supported trial court's finding that a fence and gate erected by defendants across part of roadway at its junction with highway constituted a nuisance, so as to preclude disturbance of such finding on appeal from decree for plaintiffs.

9. Easements ⚿61(10)

In action to quiet title to easement in road over defendants' land and recover damages for interference therewith by defendants' dumping of dirt and other materials on road so as to make loose fill at crest of steep embankment, provision of judgment for plaintiffs that they should have right to construct and maintain wooden guard rail along boundary of easement near such crest was not erroneous, as defendants were not burdened or prejudiced thereby and erection of such rail was reasonably necessary to enjoyment of easement. Civ.Code, § 845.

10. Easements ⚿40

An easement carries with it such additional rights as are reasonably necessary for its proper enjoyment, and owner thereof may do such things as are necessary for full exercise of his right to easement. Civ.Code, § 845.

11. Easements ⚿61(12)

A judgment, decreeing that landowners had no interest in easement over land for road purposes and could use easement only in manner not unreasonably interfering with its use by owners thereof and enjoining landowners from asserting any claim in easement in addition to decreeing that they owned fee in, on, under and over easement and had right to use land for any purpose not interfering unreasonably or inconsistent with easement owners' rights, was not inconsistent as improperly limiting and restricting rights of owners of servient estate.

12. Easements ⚿40

The owner of servient tenement may make any use of his land that does not interfere unreasonably with easement therein.

13. Easements ⚿61(10)

A judgment requiring owner of land burdened by easement for road purposes to make alterations at his own expense in part of road to conform to plan shown on private street map, as well as awarding easement owners damages for permanent injury to their adjoining land because of condition created by owner of servient tenement as result of dumping dirt, rocks and other materials on road, was erroneous as compelling him to correct a condition for which easement owners were awarded damages, thus constituting double recovery of part of damages.

14. Appeal and Error ⚿1149

Error in judgment imposing on landowners expense of altering and constructing part of road over land in addition to awarding owners of easement in road damages for injury to their adjoining land because of condition created by dumping of dirt and other materials on road by owner of servient tenement did not require reversal of judgment with respect to such double recovery, where court found on sufficient evidence that such condition was permanent nuisance, but mandatory injunction and provision that neither party could alter condition of road, except as provided in private street map, should be deleted from judgment by appellate court.

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W. F. Smith and Henry F. Walker, Los Angeles, for appellants.

Nathan E. Gillin and Button & Herzog, Hollywood, for respondents.

VALLÉE, Justice.

This is a controversy between plaintiffs, the owners of a private road and an easement for road purposes, and defendants, fee owners of the land on which the easement exists. Plaintiffs had judgment quieting their title to the easement, awarding them damages, and granting injunctive relief. Defendants appeal.

Plaintiffs are the owners of a strip of land 25 feet wide purchased and used for road purposes, called parcel 2.[1] They are also the owners, by grant, of a perpetual easement and right of way 30 feet wide for road and public utility purposes, called parcel 3. Parcel 3 is appurtenant to parcel 2 and to plaintiffs' residence property. Parcels 2 and 3 extend from a public highway to plaintiffs' residence property. The road is the only means of ingress to and egress from the public highway.

At the time they were acquired by plaintiffs, parcels 2 and 3 extended on a gradual upgrade to the public highway. Defendants, since about February, 1949, own and reside on land abutting these parcels. About October, 1949, defendant Paul Grosso "unlawfully, wilfully, maliciously and with entire disregard of plaintiffs' rights" dumped large quantities of dirt, rocks, asphalt, gravel and similar materials on parcels 2 and 3 so as to practically cover all of parcel 3 and to cover parcel 2 for about 40 feet from the point it adjoins parcel 3, to a depth of over 15 feet in places, and so as to completely obstruct and block all travel and passage over the road either on foot or in vehicles. The road remained completely obstructed and blocked notwithstanding repeated demands by plaintiffs on defendants to reopen it, until about September, 1950, when defendants partially opened it. In the latter part of September, 1950, defendants bulldozed an opening about 12 feet wide through the material at an average grade of about 14.6% for about 110 feet in such manner that only about 7 feet of the opening were within the boundaries of the parcels, and the remainder extended over the property of others. Users of the road were compelled to drive over a loose dirt fill to within 3 feet of the crest of a steep embankment over 25 feet deep. Before the materials were dumped on the parcels, the road sloped downgrade from the public highway at a grade of 4.5% for some distance, and then about 8.3% for about 110 feet.

After Grosso deposited the material, and before he made the opening, he caused a part of parcel 3 to be regraded in such manner that the surface was raised about 6 feet above what it was before the material was deposited, and thereafter caused a paved road to be constructed over the same, extending from the public highway to the residence of defendants. The paved road as constructed "was to the great detriment of plaintiffs and their property and to their disadvantage and inconvenience in the use and enjoyment of said road in going to and from their home and Blair Drive [the public highway] and constituted a wholly unnecessary, unreasonable and malicious interference with the rights of plaintiffs." Raising the level of the road over 6 feet created a theoretical grade of 31% at one point down to its level as it formerly existed. While the bulldozer was working, defendant Paul Grosso "wilfully and maliciously and in disregard of plaintiffs' rights and with intent to injure plaintiffs refused to allow the operator of a bulldozer then engaged by plaintiffs in widening and leveling the roadway on said Parcels 2 and 3 from proceeding further with said work and did himself thereafter order the work done in the manner that he, the said defendant, desired it to be done and did such work in such manner as to increase the slope of the embankment along the southeasterly side of the road on said Parcels 2 and 3 to the extent that it was almost perpendicular and too steep to retain the fill theretofore

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1. In the record plaintiffs' residence property is referred to as parcel 1, the 25-foot strip as parcel 2, and the easement as parcel 3. We follow the same designation.

deposited by Defendants on their property bordering said roadway to the southeast, and further did the work in such manner as to leave the roadway on Parcels 2 and 3, other than the portion thereof used by defendants for their own road purposes, on an average downgrade of 14.6% from [a specified point] * * * to a point approximately 110 feet southwesterly therefrom, as compared to an average downgrade theretofore existing thereon of 8.3% before said defendant interfered therewith."

In order that the road be usable at all, plaintiffs were compelled in October, 1950, to widen it to 12 or 15 feet and to adjust the grade of parcel 2 to the grade established by Grosso on parcel 3. Plaintiffs were also compelled to have the parcels surveyed, and survey stakes showing the boundaries to be reset to replace stakes Paul Grosso had covered. In October, 1950, plaintiffs, in order to protect themselves and persons lawfully using the road, constructed a fence 30 feet in length on the embankment side of parcel 3. Within a few hours after the fence was erected, defendant Paul Grosso "did wilfully and maliciously and in disregard of the safety of persons lawfully using said road pull up said fence and threw it down the embankment."

In November, 1950, plaintiffs, to avoid trespassing on the property of others, and to avoid the danger of the embankment, caused an opening of 12 feet to be made at one point, and the balance of the unpaved part of parcel 3 and all of parcel 2 to be fine graded preparatory to surfacing. Defendant Paul Grosso "wilfully and maliciously and with the intent and for the purpose of preventing plaintiffs from improving and paving the unpaved portion of" parcel 3 dumped large quantities of dirt, rocks and other material on the graded portion of the road so as to completely block and obstruct travel, and ordered plaintiffs' paving contractor to keep off. He also plowed a part of parcel 3 which had been fine graded, and displaced stakes which the surveyor had set.

In October, 1949, and at various times since, defendants placed great quantities of dirt and materials on their property abutting parts of parcels 2 and 3, and raised the elevation of parts at least 6 feet. Dirt and rocks were thereby caused to fall, and continually fell, on parcels 2 and 3 up to the time of trial, and will continue to so fall; and, as found by the court, will unreasonably interfere with plaintiffs' use of their property, and constitutes a continuing nuisance.

About March, 1950, defendants erected a fence on the easement at its junction with the public highway, extending across all but about 16 feet of the 30-foot width of the easement onto the property abutting on either side, and equipped it with gates designed to be used for opening and closing the 16 feet of open space. Defendant Paul Grosso promised plaintiffs and other property owners abutting on the easement, that he would remove the fence and gates at any time. The court found that the fence and gates obstruct the free use and enjoyment of the easement to the full width thereof by plaintiffs for road purposes, and constitute a nuisance.

The court found that as a proximate result of the acts of defendant Paul Grosso in increasing the downgrade of the roadway, plaintiffs' real property has permanently depreciated $7,000 in value, and the judgment awards plaintiffs damages against him in that sum, as permanent injury to the property.

[1] 1. Defendants first say that the volume of dirt to be removed to restore the road to its grade prior to the placing of materials on it is less than 700 cubic yards; that restoring the road to its former condition would be considerably less than $7,000; that where the cost of restoration to the former condition is less than the depreciation in value, the rule is that the cost of restoration is the most plaintiffs have been injured, Green v. General Petroleum Corp., 205 Cal. 328, 336, 270 P. 952, 60 A.L.R. 475; that, therefore, the award of $7,000 cannot be sustained. We cannot say that the court did not act within the scope of the rule. There was no evidence as to what it would cost to remove the materials deposited and the pavement laid by Grosso, and restore the road to its former con-

dition. Defendants' statement as to the amount of dirt to be removed, and the cost of removing it and the pavement and restoring the road to its former condition, is purely speculative. In Perkins v. Blauth, 163 Cal. 782, 792, 127 P. 50, 54, it was said: "[I]t was not error to instruct the jury that the difference in the market value of the land before and after the damage was the measure of defendants' liability. If, as appellants contend, there was no permanent injury to the land, or if the land could have been cleared of its sand and cured of its other injuries, and if respondent could have been reimbursed for all his losses for an amount much less than the damages awarded, it would have been permissible for appellants, in mitigation of the damages claimed by plaintiff, so to have established by evidence. They did not undertake to do so, or at least did not do so to the satisfaction of the jury, and appellants are therefore in no position here to complain." The court was justified in concluding that the condition which the defendant created and which he intended to be permanent was in fact permanent. At the trial, defendant did not offer to remove the materials and the pavement and to restore the road to its former grade and condition. His position was not only that he had a right to raise the grade of the road but that he also had the right to elevate it to the level of his land east of, and the entire length of, the easement, and he threatend to do so. He cannot wait until after an award of damages to make an offer to restore.

[2, 3] 2. Defendants next urge that the court erroneously awarded plaintiffs damages for worry, nervousness and mental distress for the safety of others. The court found that: "[A]s a direct, natural and proximate result and consequence of the acts and conduct of the defendant, Paul J. Grosso, resulting in increasing the downgrade of the roadway as aforesaid, * * each of said plaintiffs were caused further to suffer nervousness, worry, and mental distress for the safety of themselves and their daughter and others obliged to use said road on account of the dangerous conditions under which said defendant, Paul J. Grosso, forced them and their family to use said Parcels 2 and 3 in going to and from their said home to their damage as follows: To the plaintiff, Leonard F. Herzog, Fifteen Hundred Dollars ($1500.00), and to the plaintiff, Alma J. Herzog, Fifteen Hundred Dollars ($1500.00)." No authority applicable to the facts here is cited in support of this contention.

Grosso wilfully forced plaintiffs, their daughter, and others obliged to use the road to plaintiffs' residence, to drive over newly filled ground next to the edge of a steep embankment, creating a continuing dangerous condition. Grosso knew that he thereby caused plaintiffs to fear for the safety of themselves, their daughter, and others. Plaintiffs could not sleep nights when their daughter was out. Mrs. Herzog spent nights up on the road waiting for her daughter to come home.

"As an element of damages for a tort, a person may be entitled to recover for a feeling of anxiety, not only for himself but for others, if this is the expectable result of the defendant's tortious act or if the defendant intended such result." (IV Rest. Torts, 545, § 905.) In Anderson v. Souza, 38 Cal.2d 825, 243 P.2d 497, the court upheld an award of damages for the annoyance and discomfort, including discomfort for the safety of others, caused by the defendant's operation of an airport and the flying of planes. There was no error in this award of damages.

[4–8] 3. The court found that the fence and gates erected by defendants constitute a nuisance. It decreed that plaintiffs are entitled to occupy and use the easement to its full width; that defendants have no right to maintain the fence and gates, and ordered that they remove them forthwith. Defendants assign error. The fence and gates were erected near the point where the easement intersects the public highway. Defendants say the owner of the servient estate may always erect a gate across an easement where it meets a public highway, so long as it does not unreasonably interfere with the enjoyment of the easement.

The deed by which plaintiffs acquired the easement grants "a perpetual easement and right of way for road and public utility purposes * * * in, on and under a strip of land 30 feet wide." In Smith v. Worn, 93 Cal. 206, 28 P. 944, the easement granted was "over, upon, and through a road 66 feet wide". The judgment restrained the defendant from "putting up, constructing, or maintaining any gate, fence, or obstruction of any kind on any part of said way." In affirming the judgment, the court stated 93 Cal. at pages 214–215, 28 P. at page 945: "Appellant asks us to hold, as matter of law, that it appears upon the face of the grant that the grantee is not entitled to a way without gates or bars. If the question were one of law based exclusively upon the language of the grant, we should be inclined to construe the grant to be one of an open road, 66 feet wide, unobstructed by gates or bars. The right of way granted is through a *road* 66 feet wide, and this road is '*to be laid out* by the party of the first part over the lands owned by him.' The word 'road,' as used in our laws, is uniformly applied to open and unobstructed roads, unless qualified by some other word like the adjective 'private;' and such is the common as well as legal acceptation of the word. Respublica v. Arnold, 3 Yeates [Pa. 417], 421, 422; Kister v. Reeser, 98 Pa. 4 [42 Am. Rep. 608]. It is a term of greater significance than the term 'way.' [Chollar-Potosi] Mining Co. v. Kennedy, 3 Nev. [361]; Sherman v. Buick, 32 Cal. 241 [91 Am.Dec. 577]. But the question has been uniformly regarded by the courts as one of fact, for the jury. The extent of the right and duty of the respective owners towards each other is to be determined by the language of the grant, and all the circumstances existing at the time the grant was made. 'Nothing passes as incident to such a grant but that which is necessary for its reasonable and proper enjoyment.' 3 Kent, Comm. 419, 420. 'What is necessary for such reasonable and proper enjoyment of the way granted, and the limitations thereby imposed on the use of the land by the proprietor, depends upon the terms of the grant, and the purposes for which it was made, the nature and situation of the property subject to the easement, and the manner in which it has been used and occupied.' Baker v. Frick, 45 Md. 340 [24 Am.Rep. 506]; Bean v. Coleman, 44 N.H. 541; Maxwell v. McAtee, 9 B. Mon. [Ky.] 20 [48 Am.Dec. 409]; Bakeman v. Talbot, 31 N.Y. 368 [88 Am. Dec. 275]; Garland v. Furber, 47 N.H. 302; Houpes v. Alderson, 22 Iowa 162. The court heard the evidence of the parties, and considered all the circumstances under which the grant was made, the nature and situation of the property, and the terms of the grant, and found in favor of the plaintiff. The finding is supported by evidence, and cannot be disturbed." Likewise in the present case, the finding is supported by the evidence and cannot be disturbed. (See also Allen v. San Jose Land & W. Co., 92 Cal. 138, 141, 28 P. 215, 15 L. R.A. 93; Youngstown Steel etc. Co. v. City of Los Angeles, 38 Cal.2d 407, 411, 240 P. 2d 977.

Defendants cite a number of cases from other jurisdictions. The cases are not in harmony on the subject, but the great weight of authority declares the law as stated in Smith v. Worn, supra, 93 Cal. 206,[2] 28 P. 944.

[9, 10] 4. The judgment decrees that plaintiffs shall have the right to construct

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[2] Ball v. Allen, 216 Mass. 469, 103 N.E. 928, 929, Ann.Cas.1917A, 1248; Ellis v. American Academy of Music, 120 Pa. 608, 15 A. 494, 496, 6 Am.St.Rep. 739 [question is one of fact]; Johnson v. Borson, 77 Wis. 593, 46 N.W. 815, 816, 20 Am.St.Rep. 146 [the reasonableness or unreasonableness of a gate is question of fact]; Fendall v. Miller, 99 Or. 610, 196 P. 381, 383–385; Baker v. Frick, 45 Md. 337, 24 Am.Rep. 506, 511, [whether gate interfered with reasonable enjoyment of easement is a question of fact]; Luster v. Garner, 128 Tenn. 160, 159 S.W. 604, 48 L.R.A.,N.S., 87, 87 Ann.Cas.1914D, 769; Flaherty v. Fleming, 58 W.Va. 669, 52 S.E. 857, 859, 3 L.R.A.,N.S., 461; Stuart v. Larrabee, Tex.Civ.App., 14 S.W.2d 316, 320; Kinkade v. Lyons, 235 Ky. 226, 30 S.W.2d 963, 964, 73 A.L.R. 775; Evich v. Kovacevich, 33 Wash.2d 151, 204 P.2d 839; Whiteside v. Croker, 165 Ga. 765, 142 S.E. 139; Annotation, 73 A.L.R. 778.

and maintain a wooden guardrail along the boundary of the easement where it is close to the crest of the steep embankment, the guardrail to be one of the general types usually used along public highways. Defendants assign error. The assignment is frivolous. Defendants are not burdened or prejudiced in the slightest by this provision. An easement carries with it such additional rights as are reasonably necessary for its proper enjoyment. An owner of an easement may do such things as are necessary for the full exercise of the right. Civ.Code, § 845; City of Gilroy v. Kell, 67 Cal.App. 734, 743–744, 228 P. 400; Pacific Gas & E. Co. v. Crockett L. & C. Co., 70 Cal.App. 283, 294, 233 P. 370. Grosso dumped material on the easement, making a loose fill at the crest of the embankment. Obviously, it cannot be said that the erection of a guardrail is not reasonably necessary to the enjoyment of the easement. See Chandler v. Goodridge, 23 Me. 78, 83; Murray v. Dickson, 57 Tex.Civ.App. 620, 123 S.W. 179, 182–183.

[11, 12] 5. It is next asserted the judgment is inconsistent in that it improperly limits and restricts the rights of defendants as owners of the servient estate. The judgment decrees defendants are the owners of the fee "in, upon, under and over" the easement; that defendants "have a right to use said land for any purpose which does not interfere unreasonably with the easement rights held by plaintiffs therein, or is not inconsistent therewith." The inconsistency, say defendants, is that the judgment further decrees defendants have no interest in the easement; that defendants may use the easement only in a manner which does not unreasonably interfere with its use by plaintiffs; and enjoins defendants from asserting any claim in the easement. There is no inconsistency. The owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement. City of Pasadena v. California-Michigan etc. Co., 17 Cal.2d 576, 579, 110 P.2d 983, 133 A.L.R. 1186. The judgment protects defendants in all of their rights. It does not restrict or limit them in any right they have as the owners of the servient estate so long as they do not unreasonably interfere with the rights of plaintiffs.

[13] 6. Defendants claim the judgment erroneously imposes upon them the expense of altering and constructing a part of the road on the easement. This contention is well taken. The judgment (paragraph 19) decrees that the defendant Paul Grosso, within a specified time, "at his own expense, make alterations in the road over and upon the northerly 120 feet" of the easement "so that the same will conform to and be in accordance with the plan shown on the aforesaid Private Street Map * * * and that wherein said map does not specify the details of construction of said road said defendants shall construct said road in accordance with the requirements of Standard Specifications No. 151 for Public Improvements as promulgated by the Department of Public Works of the City of Los Angeles, California, and approved by the Council of said City under date of May 15, 1951, and now in effect." Plaintiffs say they did not in their complaint, or otherwise, seek this relief; that it was given on the court's own motion.

The judgment (paragraph 8) also decrees that neither party has a right to unreasonably change the grade of parcel 3 or otherwise materially alter the condition of the road without the consent of the other except as provided in the Private Street Map.

The court found and decreed that the condition created by defendant Paul Grosso on parcels 2 and 3 caused permanent injury to plaintiffs' property, and awarded them damages of $7,000 for the injury. To compel defendant to make alterations on the northerly 120 feet of the easement so as to conform to the plan shown on the "Private Street Map" is to compel him to correct a condition he created—to undo that which he had done—for which plaintiffs have been awarded damages. It constitutes double recovery insofar as part of the damages awarded are for the injury caused by the condition of the northerly 120 feet of the easement. The permanent injury to plaintiffs' property results from the condition created on parcels 2 and 3 as a whole, and the damages were awarded for that injury. Having awarded damages for the permanent injury to the property as a whole, the court may not segregate a part of the easement and compel defendant to restore it to its former condition. In Spaulding v. Cameron, 38 Cal.2d 265, 239 P.2d 625, on similar facts, the trial court awarded damages for physical injury to the plaintiff's property, awarded damages for depreciation of the market value of the property because of the continuing threat of future inundations of mud, and also ordered defendant to remove the fill or place protective measures around it. In holding that the award for the depreciation in market value and the mandatory injunction constituted a double recovery, the Supreme Court said in 38 Cal.2d at page 269, 239 P.2d at page 628: "The court found that plaintiff's property had been permanently damaged because of the continuing threat of future injury. It also found, however that this threat would continue unless corrective measures were taken, and by ordering that such measures be taken impliedly found that they were feasible. It is clear that plaintiff cannot have both remedies. If defendant obeys the injunction and takes such measures that 'the property of the plaintiff will not be endangered or threatened by the existence of such deposits of loose dirt,' there will no longer be a threat to depreciate the value of the property. Plaintiff would obtain a double recovery if she could recover for the depreciation in value and also have the cause of that depreciation removed."

[14] The error in the present case, however, does not call for reversal of the judgment with respect to the double recovery as was done in the Spaulding case. In the Spaulding case, the trial court had not found whether or not the nuisance was in fact permanent, and the Supreme Court said in 38 Cal.2d at page 270, 239 P.2d at page 629: "On retrial the trial court should determine whether or not the nuisance is in fact permanent. If it finds that it is, it should enter judgment for the decrease in market value. If it finds that it is not, it should grant injunctive relief and such additional damages as may be proved for the temporary decrease in the value of the use of the property while the nuisance continued." In the case at bar, the court on sufficient evidence found that the nuisance is in fact permanent. In view of this finding the mandatory injunction as to the north 120 feet of the easement should be deleted from the judgment. The provision of paragraph 8 of the judgment that neither party may alter the condition of the road except as provided in the Private Street Map should also be deleted.

The judgment is modified by deleting paragraph 19 and that part of paragraph 8 reading: "except as provided in the Private Street Map attached hereto, made a part hereof, and being a duplicate of plaintiffs' Exhibit No. 60 in evidence." As thus modified, it is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

CONNOR v. GROSSO et al.*

Civ. 19054.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1952.

Rehearing Denied Nov. 24, 1952.

Hearing Granted Jan. 5, 1953.

Action against two husbands and their wives for damages in the amount of the reasonable cost of removing from plaintiff's land dirt, rocks and other debris dumped thereon by one of defendant husbands. From a judgment of the Superior Court of Los Angeles County, Philbrick McCoy, J., for plaintiff, such husband and his wife appealed. The District Court of Appeal, Vallée, J., held that the evidence was insufficient to support the trial court's finding as to the quantity of materials dumped by appellant husband on plaintiff's land, so that the judgment against him must be reversed with direction to retry the single issue as to the amount of damages.

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* Subsequent opinion 259 P.2d 435.

Judgment against appellant wife reversed, and judgment against appellant husband reversed with directions.

1. Husband and Wife ⚿232(1)

In action against husband and wife for damages in amount of reasonable cost of removing dirt, rocks and other debris dumped on plaintiff's land by defendant husband from roadway between such land and land owned by defendants as joint tenants, judgment against defendant wife was erroneous, in absence of evidence that she dumped any material on plaintiff's property, joined with her husband in commission of tortious acts, ratified them, or accepted benefits thereof, or that he acted as her agent; mere facts that she was his wife and that they were joint tenants being insufficient to charge her with liability for his conduct.

2. Torts ⚿27

In action for damages in amount of reasonable cost of removing dirt, rocks and other debris dumped on plaintiff's land by defendants, evidence was insufficient to support trial court's finding that defendants dumped specified quantity of material on such land between certain dates.

3. Torts ⚿21

A person is not liable for tortious acts of others with whom he was not acting in concert.

4. Torts ⚿27

In action against husband and wife for damages in amount of reasonable cost of removing dirt, rocks, and other debris alleged to have been dumped on plaintiff's land by defendants, evidence was sufficient to support trial court's finding that defendant husband, with full notice of plaintiff's ownership of land, maliciously, deliberately, wilfully, and with intent to prevent plaintiff from using and enjoying her property, dumped dirt, rocks and other debris thereon.

5. Appeal and Error ⚿1178(6)

On reversal of judgment appealed from, retrial of issues as to which trial court's findings were supported by evidence will not be ordered.

6. Appeal and Error ⚿1178(6)

In action for damages in amount of reasonable cost of removing dirt, rocks and other debris alleged to have been dumped on plaintiff's land by defendant spouses, District Court of Appeal, on reversal of judgment for plaintiff because of insufficiency of evidence to support judgment against defendant wife and trial court's finding as to quantity of materials dumped on land by defendant husband, will direct trial court to retry single issue of amount of damages.

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W. F. Smith and Henry F. Walker, Los Angeles, for appellants.

Stanton, Stanton & Welbourn, and Louis B. Stanton, Los Angeles, for respondent.

VALLÉE, Justice.

This action arose out of the tortious conduct of defendant Paul Grosso described in Herzog v. Grosso, Cal.App., 249 P.2d 869.[1] In this case plaintiff had judgment for damages against defendants, husband and wife. Defendants appeal.

A roadway, described as parcel 2, is owned by Mr. and Mrs. Herzog. An easement for road purposes is called parcel 3. Mr. and Mrs. Herzog are the owners of the dominant estate and defendants are the owners of the servient estate in the easement. Parcels 2 and 3 are on the side of a hill and constitute one road. Plaintiff, Mrs. Connor, and her deceased husband, in December, 1945, acquired a parcel of real property which lies immediately to the west of and abuts on parcels 2 and 3, and is at the bottom of a steep embankment. On July 10, 1950, plaintiff's husband signed and acknowledged a deed of the property to her. He died on July 13, 1950. Defendants, husband and wife, acquired their property in February, 1949. It lies immediately to the east of parcels 2 and 3. The court found that between August 1, and December 31, 1950, defendants "with full notice of the ownership of said real property, and in disregard of the rights of plaintiff in and to said real property, maliciously, deliberately and wilfully, and with intent to prevent plaintiff from the use and enjoyment of said real property, dumped upon said real property of plaintiff 3184 cubic yards of dirt, rocks and other debris." The court further found that in order to restore the property to its former condition, it will be necessary for the materials to be removed, and that the reasonable cost of removal, including slippage necessarily incidental thereto, is $4,362.08. Damages in that sum were awarded plaintiff.

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[1] The causes were tried together and the two opinions should be read for a complete understanding of the facts.

The assignments of error are: 1) the evidence is insufficient to support any judgment against defendant Madolyn A. Grosso; 2) the evidence does not support the finding that defendants dumped 3,184 cubic yards on plaintiff's property, and that plaintiff was damaged in the amount of the cost entailed in removal of 3,184 cubic yards; 3) the evidence does not support the finding that 3,184 cubic yards of material were dumped on plaintiff's property by defendant Paul Grosso.

[1] The first assignment of error must be sustained. The defendants are husband and wife. They acquired their property as joint tenants in 1949. There is no evidence that Mrs. Grosso dumped any material on plaintiff's property, or that she joined with her husband in any manner in the commission of the tortious acts done by him, or that he acted as her agent. There is no evidence or ratification or acceptance of the benefits, if there were any. The mere fact that she is the wife of the defendant Paul Grosso, and that they are joint tenants, is not sufficient to charge her with liability for his conduct. Goldman v. House, 93 Cal.App.2d 572, 576, 209 P.2d 639; Citizens State Bank v. Hoffman, 44 Cal.App.2d 854-855, 113 P.2d 221.

The cases relied on by plaintiff are not analogous.[2] In each of them, there was some evidence that the wife actively participated in, or ratified, the act giving rise to the cause of action.

[2] The second and third assignments of error will be considered together. As we have stated, the court found that between August 1, and December 31, 1950, defendants dumped 3,184 cubic yards of material on plaintiff's property. Defendants' contention that this finding is without support in the evidence is well taken.

In 1944, the predecessor in interest of the parties, a Mrs. Schneider, made a road on the easement by bulldozing into the hill and dumping the earth over the embankment onto the property later acquired by plaintiff and her husband. Shortly after February, 1944, Mrs. Schneider caused a road to be made from the top of the hill on the property now owned by defendants to the easement, and dumped earth onto the property later acquired by plaintiff and her husband. In 1945, Mrs. Schneider caused the hillside abutting parcels 2 and 3 to be cut out and leveled and the earth dumped onto the property later purchased by plaintiff and her husband. About the same time, Mr. Herzog, the owner of parcel 2 and the easement, widened the then 10 to 12-foot road to 14 feet, by cutting into the side bank and dumping the earth down the embankment onto what later became plaintiff's property. This was done with the permission of the then owner of plaintiff's property, Mrs. Schneider. The evidence does not disclose the amount of earth dumped on the property by Mrs. Schneider or Mr. Herzog, but it must have been considerable. Between June 1, 1949, and August 1, 1950, defendant Paul Grosso dumped earth onto plaintiff's property; the evidence does not show how much.

An expert called by plaintiff testified that in November, 1950, the bottom of the fill of loose dirt on plaintiff's property was from 18.4 to 37.2 feet west of her property line, which is the west side of parcel 2, and the west side of part of parcel 3. He testified there were several fills, and that in April, 1951, there were 1,570½ cubic yards in the last fill—the last material dumped onto plaintiff's property. The last fill was made by Grosso in September, 1950. Another expert called by plaintiff testified there were 3,184 cubic yards of filled ground west of plaintiff's east vertical property line. He testified it would cost $4,362.03 to remove this filled material and restore plaintiff's property to its original ground level; that it would cost $1.63¼ per cubic yard to remove 1,570½ cubic yards. We have not been referred to, nor have we found, any other evidence bearing on the question.

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[2] The cases relied on by plaintiff are: Martin v. Butter, 93 Cal.App.2d 562, 209 P.2d 636; Stegeman v. Vandeventer, 57 Cal.App.2d 753, 135 P.2d 186; Santa Cruz Rock Pavement Co., v. Lyons, 133 Cal. 114, 65 P. 329; Latta v. Da Roza, 100 Cal.App. 606, 280 P. 711, 281 P. 655; Hulsman v. Ireland, 205 Cal. 345, 270 P. 948.

It is patent that the finding that defendants dumped 3,184 cubic yards of material onto plaintiff's property between August 1, and December 31, 1950, is without support in the evidence. The total amount of material dumped from 1944 to December 31, 1950, was 3,184 cubic yards. Defendant Paul Grosso may not be charged with the cost of removal of material dumped on plaintiff's property by others except such material dumped by others as may slip in removing material dumped by him. Grosso acquired his property in February, 1949. There is no evidence that he dumped any material onto plaintiff's property prior to June 1, 1949. The complaint so alleges. Of course, he should be charged with the cost of removing any slippage that may reasonably occur by reason of the removal of material dumped by him. There is no evidence that all the material dumped on plaintiff's property to her east line will slip on removal of that dumped by Grosso. There is no evidence as to the amount that will slip, or as to the cost of removing the same. The finding that defendants dumped 3,184 cubic yards of material onto plaintiff's property between August 1, and December 31, 1950, is vital to the award of damages.

[3] A person is liable for his own acts, and not for the acts of others with whom he was not acting in concert. Miller v. Highland Ditch Co., 87 Cal. 430, 431–433, 25 P. 550; Slater v. Pacific American Oil Co., 212 Cal. 648, 654–655, 300 P. 31.

[4–6] The part of the finding to the effect that defendant Paul Grosso, with full notice of the ownership of the property, "maliciously, deliberately and wilfully, and with intent to prevent plaintiff from the use and enjoyment" of her property dumped dirt, rocks and other debris thereon is amply supported by the evidence. A retrial of that issue is unnecessary. Lobree v. L. E. White Lumber Co., 53 Cal.App. 85, 92, 199 P. 821. While the judgment must be reversed, there is no occasion to order a retrial of the issues as to which the findings are supported by the evidence. Northern California Power Co. v. Flood, 186 Cal. 301, 307, 199 P. 315; Paul v. Williams, 64 Cal.App.2d 696, 703, 149 P.2d 284. The only issues remaining are how much material defendant Paul Grosso dumped on plaintiff's property, what it will cost to remove that material and any other material that may slip by reason of such removal, and what damages plaintiff may recover.

The judgment against defendant Madolyn A. Grosso is reversed. The judgment against defendant Paul J. Grosso is reversed, with directions to retry the single issue of the amount of damages, and to make findings of fact on the issue of his liability in accord with the findings previously made, and on the amount of damages in accord with the views we have expressed and the evidence to be taken, and to render judgment for plaintiff in that amount.

SHINN, P. J., and PARKER WOOD, J., concur.

114 Cal.App.2d 139

SHAMMAS v. BOYETT et al.

Civ. 18878.

District Court of Appeal, Second District, Division 1, California.

Nov. 12, 1952.

Action by payee of sight draft to recover proceeds thereof paid by drawee to another and converted by him to his own use. The Superior Court of Los Angeles County, Gregory P. Maushart, J., entered judgment in favor of the drawee, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that the evidence sustained finding that drawee acted in good faith and was not negligent in issuing and delivering to third person check payable to him in payment of endorsed draft which payee had entrusted to third person for presentation for payment.

Judgment affirmed.

1. Bills and Notes ⚷327, 425

A drawee of a draft or bill of exchange who accepts and pays it upon presentation does not thereby become a holder in due course of the instrument within meaning of the law of negotiable instruments, but the instrument is thereby discharged.

2. Bills and Notes ⚷427(1), 496(2), 524

If a negotiable instrument is payable to bearer either on its face or by endorsement in blank by person to whose order it has been made payable, one in possession thereof is presumptively the holder thereof and mere possession of the instrument is prima facie evidence of holder's right to demand and receive payment, and payment to him will discharge the instrument when such payment is made in good faith and in ignorance of facts which impair his title.

3. Bills and Notes ⚷527(1)

Where title papers and sight draft for purchase price of used automobile were endorsed by seller and delivered to employee of partnership from which seller had purchased automobile and presented by partner to drawee for payment together with lien note, executed by partnership, reciting that it was given as security for payment for automobile, evidence sustained finding that drawee was not negligent in issuing a check payable to a partner in payment of draft, and hence drawee was not liable to payee of draft for proceeds thereof converted by partner to his own use. Code Civ.Proc. § 1963, subd. 9.

4. Bills and Notes ⚷499

Fact that lien note, which was past due, was in possession of maker was presumptive evidence that it had been paid, though it bore no endorsement of payment. Code Civ.Proc. § 1963, subd. 9.

5. Appeal and Error ⚷996

Where the facts are undisputed but either one of two inferences may be fairly and reasonably deduced from such facts, a question of fact to be determined by jury, or by trial judge where case is tried without a jury, still remains in the case, and verdict or finding of trier of facts thereon cannot be set aside on appeal on ground that it is not sustained by the evidence.

6. Estoppel ⚷75

Where payee of sight draft by endorsement thereof and otherwise clothed another with apparent ownership of draft, thus enabling him to perpetrate a fraud on drawee, payee must bear the consequences of such fraud.

7. Estoppel ⚷75

Where true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over property and innocent third parties are thus led into dealing with such apparent owner, true owner will be estopped from asserting his rights as against such innocent parties.

8. Principal and Agent ⚷22(1)

The fact of agency may not be established by extra-judicial statements of alleged agent.

9. Bills and Notes ⚷511

Where third person to whom payee had entrusted endorsed sight draft for presentation to drawee for payment converted proceeds of draft to his own use and payee sought to hold drawee liable for resulting loss, testimony as to conversation between drawee and third person upon occasion of presentation and payment of draft was competent and relevant, not for the purpose of establishing agency or truth of statements made by third person, but as disclosing nature of transaction between him and drawee at time of payment.

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Frank J. McCarthy, Los Angeles, for appellant.

Daniel W. Gage, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by plaintiff from a judgment entered in favor of the defendant R. A. Boyett, doing business as R. A. Boyett Automobile Finance, in an action wherein plaintiff sought to recover from the respondent and others the sum of $3,900. The defendants other than the respondent suffered their defaults to be entered and judgment thereon was entered against them, which has since become final.

The facts of the case as disclosed by the evidence with but little, if any, conflict are as follows: Appellant, who is engaged in the business of buying and selling used automobiles in the city of Los Angeles, on February 24, 1949, purchased a 1949 Cadillac automobile from the defendants Van Wyke and Harrison, co-partners, doing business as Auto Clearing House, and paid therefor the sum of $3,250 but with the understanding that upon the sale of the vehicle he would pay a further sum equal to the difference between $3,250 and $3,800 as well as one half of any excess, less expenses, above the latter amount. The parties undertook to evidence their agreement in this respect by the unusual means of having Auto Clearing House execute a "lien note" in favor of appellant in the sum of $3,250, due March 24, 1949, and which recited that it was given "as security" for the payment of the automobile here involved. The record is obscure as to whether or not this lien note was executed in duplicate but it is undisputed that either the note itself or a copy thereof bearing an endorsement upon the reverse side placed thereon by an employee of the appellant reading, "2-24-49 Flooring on 49 Cad Bal due on Sale of Car" was delivered by the appellant to Auto Clearing House. The other copy, if ever existent, was not produced by or accounted for by appellant.

The automobile in question bore a Michigan registration and was formerly owned by one Dostinick from whom it had been purchased by Auto Clearing House. Upon the payment of the sum of $3,250 by appellant to the latter, possession of the car was delivered to the appellant together with the registration certificate, certificate of title, verification of vehicle, a bill of sale executed by Dostinick in which the name of the vendee was left blank, and a bill of sale from Auto Clearing House to appellant. Thereafter on or about March 17, 1949, appellant negotiated a sale of the vehicle to defendant Perry, a used car dealer in San Diego, for the sum of $3,900. During the pendency of this transaction appellant was advised that Perry's purchase of the automobile was dependent upon the latter's ability to finance the same through the respondent who was engaged in the automobile financing business in the city of San Diego. Upon telephoning to respondent appellant was advised respondent would do so provided Perry would reduce the amount of financing to ninety per cent of the wholesale Bluebook value of the automobile. Being told by Perry that he could meet this condition, appellant procured from Perry the execution of a purchase order for the car together with a sight draft drawn upon the respondent in favor of appellant in the sum of $3,900 payable through Security Trust & Savings Bank of San Diego upon presentation of title and registration of the automobile, possession of which was thereupon delivered to Perry. The draft bearing the endorsement of appellant and to which were attached the title documents which appellant had obtained from Auto Clearing House with the exception of the bill of sale from the latter to appellant together with a bill of sale from appellant to Perry was deposited by appellant with the Security-First National

Bank of Los Angeles, which in turn placed its endorsement thereon and forwarded the same to the Security Trust & Savings Bank of San Diego for payment.

Following the arrival of the documents in San Diego respondent called at the bank for the purpose of taking up the draft but upon examining the title papers accompanying it refused to accept the same, and instructed the San Diego bank to return the same to appellant's bank in Los Angeles in order that the necessary corrections in the documents might be made. The draft together with the accompanying papers were returned to Los Angeles on March 29th and the indicated corrections having been made therein, appellant telephoned to the respondent and asked if the draft would be paid if presented. In reply respondent stated that payment would be made if the papers were in order. Following this conversation appellant delivered the draft endorsed in blank together with the corrected title papers to one Hamilton, an employee of Auto Clearing House, with directions to present the same for payment to the respondent and bring the proceeds of the collection to appellant. Prior to the delivery of the documents to Hamilton, and apparently in contemplation thereof, appellant had a conversation with the defendant Van Wyke in which he requested that he be given "some evidence of good faith" in permitting the draft and documents to be taken from his possession. Van Wyke thereupon stated to appellant that he would deliver a check to him upon receipt of the papers and that when the draft was paid, appellant could pay Auto Clearing House the difference due them and "they would pick up their check." Accordingly when the papers were delivered to Mr. Hamilton as previously stated the latter left with appellant what he took to be a bank check but which was in fact a draft drawn by Auto Clearing House upon itself in favor of the appellant in the sum of $3,315.68, and bearing on the face thereof the notation: "Repay loan 48 Cad. 61 Sdnt." While there was apparently no discussion as to who was to take the papers to San Diego, both appellant and Hamilton seemingly assumed that the latter would do so. Hamilton, however, delivered them to his employer, defendant Van Wyke, who in turn delivered them to his co-partner, Harrison, by whom they were taken to San Diego on the following day and presented to the respondent.

Upon examining the papers and finding them satisfactory respondent proceeded to draw a check for the amount of the draft in favor of the appellant and tendered the same to the defendant Harrison who refused to accept the same and requested a check made payable to himself. What transpired upon this occasion may best be made to appear by the testimony of the respondent—"When he (defendant Harrison) saw the check for Nick Shammas Auto Company he said to me, 'I can't use the check, it is necessary I cash this check to my order, I cash this check back to protect the check that we have given to Nick Shammas Auto Company for this automobile. I have to make my check good at the bank,' and he presented it in front of me, this lien note, as evidence that the automobile was their automobile and not Shammas's and further that the draft had been endorsed by Shammas and I was buying a negotiable paper, negotiable instrument, and I issued a check to A. E. Harrison for $3,900." And again respondent testified with reference to his transaction with Harrison as follows: "Well, about the substance of what he (Harrison) said exactly, not in the exact words, the effect of it was that the Auto Clearing House had bought the automobile in Fresno and that they didn't have enough money to cover their check and that they had to borrow money from Nick Shammas to cover their check and that they had sold the automobile, had sent Perry out to buy the automobile and that when the papers were so badly messed up they had to buy the papers back and they wanted to get the money in order that they could cover their check that they had given to Shammas."

Following this respondent tore off his signature to the check which he had previously made payable to appellant and issued a new check payable to Harrison, who appropriated the money received thereon to his own use. It may also be added that upon presentation by appellant of the draft drawn by Auto Clearing House in his favor and which was delivered to him by Hamilton when he received the draft drawn upon respondent as previously related, the same was dishonored.

After finding the facts substantially as set forth above, the trial court concluded that the appellant was negligent in entrusting the draft and title documents to Hamilton; that respondent was not negligent in making payment of the draft to Harrison and as a consequence that appellant was not entitled to recover. The correctness of this determination is the principal question presented upon this appeal.

[1] Counsel in their briefs undertake to debate at some length the question as to whether or not respondent was a holder in due course of the draft in question. We however fail to see the relevancy of this discussion for it would seem fairly obvious that a drawee of a draft or bill of exchange who accepts and pays the same upon presentation does not thereby become a holder in due course of the instrument as that term is employed in the law of negotiable instruments. And the authorities uniformly so declare. In South Boston Trust Co. v. Levin, 249 Mass. 45, 143 N.E. 816, 817, it is said: "(I)t cannot be successfully contended that a drawee, who has paid the instrument at or after maturity, is a holder in due course. On the contrary the instrument is thereby discharged." To the same effect are the following: Woodward v. Savings & Trust Co., 178 N.C. 184, 100 S.E. 304, 5 A.L.R. 1561, 1565; American Hominy Co. v. Millikin Nat. Bank, D.C. S.D.Ill., 273 F. 550, 555; State Planters Bank & Trust Co. v. Fifth-Third Union Trust Co., 56 Ohio App. 309, 10 N.E.2d 935, 941; Gerlach v. North Texas & S. F. Ry. Co., Tex.Civ.App., 244 S.W. 662, 666; Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S.W. 939, 940; Brannan's Negotiable Instruments Law (6th ed.), p. 558, sec. 52.

The question here, therefore is not whether respondent was a holder in due course, but whether payment of the draft by him to defendant Harrison operated to discharge the instrument and bar a recovery by appellant.

[2] If a negotiable instrument is payable to bearer either on its face or by endorsement in blank by a person to whose order it has been made payable, one in possession thereof is presumptively the holder thereof. Bank of California v. J. L. Mott, I.W., 113 Cal. 409, 45 P. 674; Hall v. Thurston, 176 Cal. 738, 740, 171 P. 285. Hence mere possession of the instrument is prima facie evidence of the person's right to demand and receive payment, and payment to him will discharge the instrument when made in good faith and in ignorance of facts which impair his title. 8 Am.Jur., p. 490, sec. 848; 10 C.J.S., Bills and Notes, § 460, p. 1001.

[3] In the instant case we find no basis for the suggestion that in paying the draft to Harrison respondent acted in bad faith or with actual knowledge that Harrison did not have title thereto. The argument of counsel for appellant to the contrary is that respondent then had knowledge of facts sufficient to put him upon inquiry, which if pursued would have disclosed lack of ownership of the instrument by Harrison. In support of this assertion counsel directs attention to the fact that up to the time of the payment of the draft respondent had had no dealings with any person other than appellant and Perry in connection with the transaction involving the sale of the automobile to the latter; the assurance given to appellant by respondent at the inception of the transaction that he (respondent) would accept and pay the draft if Perry met certain conditions and the papers were otherwise in proper order; respondent's knowledge that possession of the automobile had been delivered to Perry; that neither the name of Harrison nor Auto Clearing House appeared in the title papers accompanying the draft; and the conversation between respondent and appellant upon the day prior to the payment of the draft when in answer to appellant's inquiry respondent stated that he would pay the draft if sent to him and the papers were found to be in proper order.

[4] All of these facts, however, if conceded to be susceptible to the inference which appellant seeks to deduce therefrom, are not necessarily inconsistent with the apparent ownership of the draft in Harrison on the date of its payment, as evidenced not only by his possession thereof endorsed in blank but also the possession of the lien note executed by his firm in favor of the appellant and which recited that it was given as security for the payment of the automobile in question. At that time the lien note was past due, and while, as pointed out by counsel for appellant, it bore no endorsement of payment thereon, the fact alone that it was in possession of the maker was presumptive evidence of its having been paid. Code Civ.Proc., sec. 1963(9); Turner v. Turner, 79 Cal. 565, 566, 21 P. 959.

[5] The most that may be said in appellant's behalf is that, viewed in the light most favorable to him, the evidence might reasonably have warranted the trial judge in drawing the inference which appellant seeks to deduce therefrom. Such concession however would not compel a reversal of the trial court's determination to the contrary, this by reason of the well established rule that, although the facts are undisputed "if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury) and * * * the verdict of the jury or the finding of the trial judge thereon cannot be set aside" upon appeal on the ground that it is not sustained by the evidence when regarded in the light most favorable to the support of the judgment. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123. And as we believe that the evidence here fairly and reasonably warrants the trial court's finding in favor of the respondent upon this issue we are concluded thereby.

[6, 7] In closing the discussion upon this phase of the case it should perhaps be added that, while we do not concur in the trial court's conclusion that respondent was wholly free from negligence, rather believing that both parties to some extent at least failed to exercise due care in the premises, nonetheless each was the innocent victim of the fraudulent conduct of Harrison, and accordingly we find ourselves in agreement with the view expressed by the trial court that appellant, having clothed Harrison with the apparent ownership of the draft, thus enabling him to perpetrate the fraud, must bear the consequences thereof. The equitable principle applicable here is well expressed in Kaku v. Giffen, 13 Cal.App.2d 683, 685, 57 P.2d 1001, 1002, as follows: "'As originally said in McNeil v. Tenth Nat. Bank, 46 N.Y. 325, 7 Am.Rep. 341, and approvingly quoted in Woodsum v. Cole, 69 Cal. 142, 10 P. 331, and Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P. 405: "Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." The same general doctrine was applied in Schultz v. McLean, 93 Cal. 329, 356, 28 P. 1053, where the fraud occasioning injury was practiced by the plaintiffs' own agent in the matter of the delivery of a deed, the vendee being one in good faith and for value. This court there said: "'Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss.' This principle is recognized by section 3543 of the Civil Code, which reads: 'Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.' * * * In this case, plaintiffs and defendant were both innocent. Neither knew that the fraud was being practiced; but if that

fraud was productive of injury, the injury must result to the plaintiffs, for they placed it in the power of the wrongdoer to perpetrate the fraud.'"'"

Under the circumstances here if Harrison had demanded and received payment of the draft in cash rather than by check payable to his order and thereafter had converted the same to his own use, we do not apprehend that it could be reasonably contended that respondent could be held liable therefor to appellant. And we see no reason why a different result follows because payment was made by check drawn to the order of Harrison.

[8, 9] Finally appellant complains that the trial court erred in admitting, over his objection, evidence of the conversation had between respondent and Harrison upon the occasion of the presentation and payment of the draft. It is urged that such evidence was inadmissible under the elementary rule that the fact of agency may not be established by means of the extrajudicial statements of the alleged agent, and that in the absence of proof of agency the testimony was hearsay. The testimony, however, had no tendency to establish agency, for, far from asserting that he was acting as agent of the appellant, Harrison avowed his ownership of the instrument and demanded payment thereof in his own right. The evidence was competent and relevant, not for the purpose of establishing agency or the truth of the statements then made by Harrison, but as disclosing the nature of the transaction between Harrison and respondent upon the occasion in question. The principal issue in the case was whether or not payment of the draft by respondent to Harrison operated to discharge the instrument and relieve the respondent from any obligation thereon to the appellant, and this issue could be determined only by an inquiry into the circumstances attending such payment. There was therefore no error in the trial court's ruling.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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114 Cal.App.2d 148

HAMMETT v. McINTYRE et al.

HAMMETT v. McINTYRE.

Civ. 18973.

District Court of Appeal, Second District,
Division 1, California.
Nov. 12, 1952.

Action for personal injuries arising out of automobile collision. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment against driver of automobile, made finding that automobile was not operated at time of accident with permission of owner, and plaintiff and defendant driver appealed. The District Court of Appeal, White, J., held that driver had been deprived of fair trial.

Reversed and remanded for new trial.

1. Attorney and Client ⚷20

Insurance company attorneys who represented insured automobile owner and also driver assumed toward driver high duties, and, if counsel had reason to believe that discharge of duties would produce conflict of interests, it was duty of counsel to take appropriate steps to terminate relationship. Business and Professions Code, § 6068; Rules of Professional Conduct, rule 1 et seq.

2. Attorney and Client ⚷20

If attorney is faced with representing claims inconsistent with those of his client, or with conflicting claims of two clients, attorney must terminate the relationship of attorney and client with the client whose interests would prevent the attorney from devoting his entire energies in that client's behalf. Business and Professions Code, § 6068; Rules of Professional Conduct, rule 1 et seq.

3. Appeal and Error ⚷1046(1)
Constitutional Law ⚷314

Where attorneys for insurance carrier represented both insured automobile owner and driver, and liability policy contained provision extending coverage to persons operating automobile with named insured's consent, and answer filed on behalf of insured and driver included denial that automobile was operated by driver with insured's consent, driver was deprived of fair trial essential to due process and was entitled to new trial. Business and Professions Code, § 6068; Rules of Professional Conduct, rule 1 et seq.

4. Insurance 🔑514½

In action arising out of automobile accident wherein insured contended that automobile had been driven without permission of insured, if it were necessary under insurance policy for insurer to provide driver of automobile with attorney, counsel provided should be attorney not associated with firm representing the insurer.

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Joseph A. Ball, Ball, Hunt and Hart, Long Beach, for appellant Lucille M. McIntyre.

Demler & Eckert, Edison J. Demler, Long Beach, for appellant Forrest M. Hammett.

Parker, Stanbury, Reese & McGee, Richard E. Reese, Los Angeles, for respondent J. B. McIntyre.

WHITE, Presiding Justice.

Forrest M. Hammett brought an action for personal injuries sustained in a collision between the automobile in which he was riding and a Pontiac automobile operated by Lucille M. McIntyre and owned by the defendant J. B. McIntyre. It was charged that Lucille M. McIntyre was operating the Pontiac automobile with the consent of the owner, J. B. McIntyre. The law firm of Parker, Stanbury, Reese & McGee filed an answer on behalf of both Lucille M. McIntyre and J. B. McIntyre which included a denial that the Pontiac automobile was being operated by Lucille M. McIntyre with the knowledge or consent of J. B. McIntyre.

Trial without a jury resulted in a judgment in favor of the plaintiff for the sum of $25,932.19 against Lucille M. McIntyre only, the court finding that the Pontiac automobile was not being operated by her with the consent, knowledge or permission of the owner, J. B. McIntyre.

Plaintiff appeals from the judgment, attacking the finding of no permissive use as not supported by the evidence and urging that a new trial should have been granted. Defendant Lucille M. McIntyre also appeals upon the ground that she was denied a fair trial; that her interests were prejudiced because she was represented by counsel for an insurance company whose interests were adverse to hers; and that the trial court abused its discretion in denying a new trial.

Defendant J. B. McIntyre is the father of George McIntyre. George McIntyre and Lucille McIntyre are husband and wife. J. B. McIntyre is the owner and operator of a meat market in Long Beach. George is an employee of his father, and was in his employ at the time of the accident, which took place on September 8, 1950. At that time there was in effect a policy of liability insurance issued by Farmers Insurance Exchange indemnifying Lucille and George as owners of a 1939 Plymouth automobile against claims for injury to one person to a limit of $10,000 and for injury to more than one person to a limit of $20,000. J. B. McIntyre, father of George, was the owner of a 1946 Pontiac sedan, which he used in his business. He was insured against liability by American Associated Insurance Companies to a limit of $25,000 for injury to one person and $50,000 for injury to more than one person, the policy containing the usual provision extending coverage to a person other than the named insured when such person was operating the automobile with the permission of the former.

These two appeals arise out of the sole factual issue presented to the trial court, to-wit, whether at the time of the accident Lucille McIntyre was operating the Pontiac automobile with the permission of her father-in-law, J. B. McIntyre. It appears that J. B. McIntyre took an extended vacation commencing in July, 1950, leaving his son George in charge of the meat market. It is conceded that George had his father's permission to use the Pontiac in connection with the operation of the business, but whether such permission went any farther than this, either expressly or by implication, is a question upon which the parties are in sharp disagreement, and an extended consideration of the evidence is necessary. Further, in considering the contention that the court erred in denying a new trial, it is necessary to set forth a detailed statement of the proceedings before and at the trial as well as the showings made by the parties on the motion for new trial.

There is apparently no dispute as to the following facts: On the evening of September 6, 1950, the Plymouth automobile owned by George and Lucille had a flat tire. George and Lucille thereupon drove from the market to their home in the Pontiac owned by the father. The following morning they returned to the market in the Pontiac. Leaving George at the market, Lucille reurned home in the vehicle. In the evening of that day, September 7, Lucille returned in the Pontiac to the market and found that George had already left the market in the Plymouth. Lucille had a companion in the car with her. She and her companion had been drinking and did not arrive at the market until it had been closed. Finding the market closed and George gone, Lucille and her companion repaired to a bar. This was on the evening of September 7. The accident occurred at 3 a. m. on September 8.

After summons and complaint in this action were served upon J. B. McIntyre and Lucille, the matter was referred to American Associated Insurance Companies, the insurer of J. B. McIntyre. The claim department of the insurer wrote to Lucille as follows:

"We are writing to advise that the amount prayed for in Superior Court action entitled 'Forrest M. Hammett v. Lucille M. McIntyre, J. B. McIntyre, et al.' is in the total sum of $83,000.00 and therefore is in excess of the limits of your policy with this Company.

"The amount sued for in the complaint is no indication of the amount which would be awarded if judgment were rendered in favor of the plaintiff, but because plaintiff is asking for a larger amount than is covered by your policy, we wish to notify you that you have a right to employ counsel of your own choosing and at your own expense, to represent you as to your uninsured interests.

"We have referred this action to our Attorneys, Parker, Stanbury, Reese and McGee of 1217 Foreman Building, Los Angeles, who will take all steps necessary to provide an adequate defense. *It is not necessary in our opinion, that you go to the expense of employing counsel to be associated with our attorneys and we are writing this letter, not for the purpose of suggesting or advising that you take this step, but merely to let you know that you have the right to do so if you wish.*" (Emphasis added.)

Parker, Stanbury, Reese & McGee prepared a joint answer to plaintiff's complaint on behalf of J. B. McIntyre and Lucille. This answer was verified by J. B. McIntyre only. It contained a denial of the allegation of the complaint that Lucille was driving the Pontiac with the knowledge, consent and permission of J. B. McIntyre. On the morning of the trial, September 5, 1951, George and Lucille McIntyre attended at the office of Parker, Stanbury, Reese & McGee, and Lucille executed a substitution of attorneys, substituting R. S. Harrington as her attorney. Mr. Harrington was an associate of the firm of Parker, Stanbury, Reese & McGee. At the trial it was stipulated that the accident was caused solely by the negligence of Lucille. There can be no question as to the good faith and advisability of this stipulation. A jury was thereupon waived by all parties and the trial proceeded before the court upon the issues of damages and whether Lucille was operating the Pontiac with the permission of J. B. McIntyre. The trial court found that she had no such permission, upon her testimony given under section 2055 of the Code of Civil Procedure. No evidence was offered for the defense. The court found and awarded damages of $25,932.19 against Lucille only.

It is charged in the opening brief of appellant Lucille McIntyre that Mr. Reese and Mr. Harrington, of defense counsel. caused George McIntyre to leave the courtroom and remain away so that he could not be called to testify that J. B. McIntyre had given him permission to use the Pontiac without any restrictions and that he in turn had permitted his wife to use it. The charges and countercharges in this connection have no bearing on the decision of the cause. The plaintiff, after examining Mrs. Lucille McIntyre and presenting evidence of damages, rested his case, and submitted the issue of permissive use to the court.

When called as a witness under section 2055 of the Code of Civil Procedure, Lucille McIntyre testified that J. B. McIntyre when he left on vacation had left her husband and two other butchers in charge of the business; that she helped her husband in the evening with the "book work" "most evenings", driving to the market in the evening in their Plymouth and arriving around six in the evening; if their Plymouth was in working order they would drive in it together to work in the morning and she would then drive home and return in the Plymouth in the evening; that she had used the Pontiac twice to go to the bank; that she did not know whether her husband knew which car she was using when she went to the bank; that whenever she and her husband rode together her husband did the driving; that he never told her she could not use the Pontiac, nor had she told him she had or would use it; that on the evening of September 6 she and her husband came home from the market in the Pontiac because the Plymouth had a flat tire; that she and her husband returned to the market the following morning; the Plymouth then had a flat tire; that there was no discussion between her and her husband as to which car she was to take, but she returned home in the Pontiac. Before leaving for the market in the evening, Lucille and her companion, Mrs. G———, had "possibly three" highballs at Lucille's house. They proceeded to the market, arriving some time after 7 p. m., and found George had gone and the market was closed. Beyond this point Lucille does not remember. Other testimony, however, of undoubted verity, indicates, as heretofore stated, that Lucille and her companion proceeded to a bar and were still trying to find their way home when the collision occurred at 3 a. m. the following morning. On cross-examination Lucille testified that she had never driven the Pontiac before her father-in-law went on vacation; that she knew the Pontiac was kept on the premises for business use only and that she was not supposed to drive it for pleasure; that she was not employed in the market and her purpose in driving to it was to help her husband so he could get home early. She further testified that she drove to the market on the evening of September 7 to find out why her husband had not yet come home, and also that her father-in-law had never given her permission to use the Pontiac. Minor discrepancies in her testimony developed on redirect and recross-examination and by reference to her testimony taken by deposition.

We shall consider first the appeal of defendant Lucille M. McIntyre. Her position, succinctly stated, is that her counsel in reality abandoned her as their client for the avowed purpose of protecting some third party (American Associated Insurance Companies) which was not a party to the action, and that appellant Lucille M. McIntyre was thereby prevented from having a fair trial on the issue of permissive use of the Pontiac automobile.

It is conceded that counsel for this appellant and her co-defendant J. B. McIntyre had been employed by the latter's insurance carrier to represent her in this action. Under these circumstances, counsel no doubt felt that they were under the duty to represent the interests of the insurance company as well as the interests of the appellant. Ordinarily, there is no conflict of interests involved in such a situation, but that such conflict may arise seems quite obvious from the claims made by the appellant Lucille M. McIntyre in this proceeding.

[1] In assuming to act as counsel for appellant in this action, the firm of Parker, Stanbury, Reese & McGee assumed toward her the high duties imposed by statute, Bus. and Prof. Code, sec. 6068, and by the rules governing professional conduct, Rules of Professional Conduct, 33 Cal.2d 27–31, and whenever counsel had reason to believe that the discharge of those duties would conflict with the discharge of their duties to the insurance carrier, it became the duty of such counsel to take appropriate steps to terminate the relationship, Pennix v.

Winton, 61 Cal.App.2d 761, 773, 143 P.2d 940, 145 P.2d 561.

From the counter affidavit of Attorney Richard E. Reese, one of counsel for respondent J. B. McIntyre, filed in opposition to the motion for a new trial, it is manifest that appellant Lucille M. McIntyre's counsel did not consider there was a conflict of interest between her and respondent J. B. McIntyre or his insurance carrier for the reason, as set forth in the affidavit, "That the said Lucille M. McIntyre was at all times fully advised of and knew that J. B. McIntyre and the American Automobile (sic) Insurance Company contended that under the undisputed facts there was no permissive use at the time of the accident. She also knew, because she had been told, that the action was going to be defended upon the issue of no permissive use as far as J. B. McIntyre was concerned."

It is further averred in the aforesaid affidavit that the reason for substituting Attorney Harrington as counsel for this appellant was, "That in order to keep separate the identity of the defendants before the jury for psychological reasons, we desired to have Mr. Harrington represent her before the jury and that affiant would continue to represent J. B. McIntyre in the hope that such strategy would help keep the damages reasonable and in the hope that a directed verdict could be obtained for J. B. McIntyre, getting him out of the case entirely before it got to the jury and leaving her as the sole defendant in the action at the time the case would be decided by the jury. The said Lucille M. McIntyre, in the presence of her husband, stated that the arrangement as outlined to her was perfectly satisfactory and thereupon executed the substitution of attorneys, placing Mr. Harrington in the case as her counsel of record. She stated to affiant in the presence of her husband that she knew she had no business driving the car at the time of the accident and that she was "extremely sorry about the whole thing" and "That had affiant known that the matter would finally go to trial before the Court without a jury, Mr. Harrington would not have been substituted into the case for Mrs. McIntyre but affiant would have continued to represent both Lucille and J. B. McIntyre for the reason that both Lucille M. McIntyre and J. B. McIntyre knew full well of the fact that the American Automobile Insurance Company was contending that she was driving the car without the permission of J. B. McIntyre and she knew full well that J. B. McIntyre was contending that she was driving the car without his permission."

The foregoing averments are in the main contradicted by appellant in her affidavit filed on the motion for a new trial. In her affidavit appellant states that on the morning of the trial she was introduced to Attorney Reese of the firm of Parker, Stanbury, Reese & McGee; that Attorney Reese introduced her to Attorney Harrington, stating that the latter was "going to represent affiant inasmuch as there was some issue or conflict of interest between herself and J. B. McIntyre; that at said time and place affiant was advised by Mr. Reese that the evidence against her was overwhelming and he was going to put an argument about the father not being involved and going to admit it was affiant's fault that the accident occurred; affiant was asked by Mr. Reese if that was all right and affiant stated, 'I guess so'; Harrington gave affiant no advice other than to testify to the truth;

"That when the case proceeded to trial Mr. Harrington gave affiant no additional advice concerning the case nor did he discuss with affiant anything concerning the issues or other outcome of the case;"

[2] The long and firmly established reputation of the firm of Parker, Stanbury, Reese & McGee at the bar for ethical conduct and fidelity to duty warrants the assumption that in this proceeding their intentions and motive were honest, but honesty of purpose, intention and motive is not the test for determining the course an attorney must pursue when confronted with a situation wherein he is faced with representing claims inconsistent with those of his client, or with conflicting claims of two clients. When such a situation arises, an attorney must terminate the relationship of attorney and client with the client whose

interests would prevent the attorney from devoting his entire energies in that client's behalf and to that client's interests, McClure v. Donovan, 82 Cal.App.2d 664, 666, 186 P.2d 718; Anderson v. Eaton, 211 Cal. 113, 116, 293 P. 788.

As heretofore set forth, appellant herein was the insured under a policy issued by Farmers Insurance Exchange under the terms of which said appellant was covered up to $10,000 while she was driving the Pontiac automobile belonging to defendant J. B. McIntyre at the time of the accident, whether she was driving said vehicle with the permission of J. B. McIntyre or not. However, under the policy issued to defendant J. B. McIntyre, he was insured against liability by American Associated Insurance Companies up to a limit of $20,000 for injury to one person, and this coverage was extended to appellant Lucille M. McIntyre provided she was operating the Pontiac automobile with the permission of the named insured.

The honesty of purpose, intention and motive of Parker, Stanbury, Reese & McGee is indicated by the fact that according to the aforesaid affidavit of Attorney Reese of that firm, "That when the summonses and complaints were served upon the defendants J. B. McIntyre and Lucille M. McIntyre the American Automobile Insurance Company requested the Farmers Insurance Exchange to take over the defense of the action on behalf of Lucille M. McIntyre and to engage attorneys to represent her for the reason that the American Automobile Insurance Company had concluded that under the undisputed facts she was not driving the vehicle with the permission of J. B. McIntyre. The Farmers Insurance Exchange refused to take over the defense for Lucille M. McIntyre and refused to engage attorneys to represent her in the lawsuit. The said American Automobile Insurance Company, because of the fact that the complaint alleged that Lucille McIntyre was driving the car with the permission of J. B. McIntyre and it was therefore the obligation of the American Automobile Insurance Company to furnish a defense of the action on her behalf, did refer the defense of the action to Parker, Stanbury, Reese & McGee.

"That on December 14, 1950, the Farmers Insurance Exchange and its general counsel, Mr. Robert Early, were notified in writing by the firm of Parker, Stanbury, Reese & McGee that the trial of this action had been set on September 5, 1951, at 9:15 A.M. in Department One of the Los Angeles Superior Court. The said Robert Early and the Farmers Insurance Exchange were further notified in writing on the same day and in the same letter that their assured, Lucille M. McIntyre, and the assured of the American Automobile Insurance Company, J. B. McIntyre, were both served with notices for perpetuation of testimony in regard to insurance policies in effect at the time of the accident. The said Robert Early and the Farmers Insurance Exchange were requested to advise Parker, Stanbury, Reese & McGee what they intended to do about the case of Lucille M. McIntyre. The said Robert Early did not answer the letter in writing, nor did the Farmers Insurance Exchange, but by telephone call from the firm of Early, Maslach, Foran and Tyler, general counsel for the Farmers Insurance Exchange, Parker, Stanbury, Reese & McGee were informed that they intended to do nothing about the case."

Now however, when by reason of the judgment rendered herein on the issue of permissive use, Farmers Insurance Exchange finds itself confronted with the obligation of paying $10,000 upon the judgment for $20,932.19 rendered against appellant Lucille M. McIntyre, we find them earnestly, vigorously and eloquently seeking to vindicate the right of said appellant to have independent legal advice. And, as usual in cases of a controversy such as this between two insurance companies, we find the insured, appellant Lucille M. McIntyre, caught in the middle thereof. Had Farmers Insurance Exchange accepted their obligation when it was tendered them by the law firm of Parker, Stanbury, Reese & McGee, their insured, appellant herein, would have had the independent legal advice to which she was entitled and the issue with which we are here concerned would not have arisen. This is not intended as any criticism whatsoever of the law firm of Ball, Hunt & Hart who now represent appellant Lucille M. McIntyre. They entered the litigation only after the judgment was rendered and were not parties to the aforesaid actions of Farmers Insurance Exchange.

[3] We have concluded that the judgment must be reversed and the cause set at large for a new trial. A review of this entire proceeding impresses us that so far as appellant Lucille M. McIntyre is concerned, there is an absence of that element of fairness which is essential to due process.

[4] We are persuaded that since the complaint alleged that appellant was driving the Pontiac with the permission of J. B. McIntyre, the insured of American Associated Insurance Companies, and the insured contended he had given no such permission, there arose, under the facts of this case, a possible or potential, if not actual, conflict of interest between the insured and appellant driver of the vehicle at the time of the accident in question as to the issue of permissive use. The advice to waive a jury and to stipulate that the accident in question was solely caused by the negligence of appellant Lucille M. McIntyre should have been given to her by counsel not obligated to uphold the contention of defendant J. B. McIntyre that appellant was driving the vehicle in question without his permission. And if the American Associated Insurance Companies were obligated under their policy of insurance to provide counsel for appellant, that counsel should have been an attorney not associated with the firm of lawyers representing the insurance company. At the trial the plaintiff called appellant herein under section 2055 of the Code of Civil Procedure. She was cross-examined at considerable length by Attorney Reese, one of the lawyers representing her father-in-law, J. B. McIntyre and the insurance company, and who, up to the morning of the trial had represented her. That this cross-examination was conducted with the evident purpose of establishing that the insured defendant J. B. McIntyre did not give her permission to drive the Pontiac is manifest. Appellant at the time was represented by an associate of the attorneys representing the American Associated Insurance Companies, and he asked her only one question and that was as to whether she sustained some kind of head injury in the accident. Appellant frankly admitted that she had no contact with the insured defendant J. B. McIntyre and that her consent came from her husband who was the son of J. B. McIntyre. Appellant's husband, who admittedly had permission to use the Pontiac, was not called to testify whether or not that permission was plenary and without restrictions upon its use, and whether he had permitted his wife to use the vehicle. Upon a retrial, appellant, with the aid of independent legal advice, will be permitted to present whatever evidence she may have upon the issue of permissive use, including the testimony given by the insured defendant J. B. McIntyre in his deposition taken in preparation of the motion for a new trial, wherein the following appears:

> "Q. Did you have any conversation with him (appellant's husband) upon your leaving as to the use of your Pontiac? A. None other than he could use the car for business purposes.
>
> "Q. Did you place any restriction or tell him it could not be used for anything other than business? A. No.
>
> * * * * * *
>
> "Q. It was your intention in so saying, that he was to use the Pontiac if he should so desire to go to and from home, is that true? A. That is true."

These and other considerations to us make it appear necessary, upon the theory that good law and good morals should be one and inseparable, that in the interests of justice and fairness a retrial should be had. Without deciding whether a correct decision has been rendered in this particular case, to us it seems imperative that the fairness and purity of trial procedure is of paramount importance.

In view of what we have herein stated, it becames unnecessary to consider or decide other issues raised on the appeal of plaintiff Forrest M. Hammett for the reason that upon a retrial the issue of permissive use will probably not be determined upon the limited testimony adduced at the former trial.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

GUDELJ v. GUDELJ. *

No. 15070.

District Court of Appeal, First District,
Division 1, California.

Nov. 7, 1952.

As Amended on Denial of Rehearing
Dec. 6, 1952.

Hearing Granted Jan. 5, 1953.

Wife brought suit for divorce against husband, on ground of extreme cruelty, and husband cross-complained for divorce. The Superior Court of the City and County of San Francisco, Sylvain J. Lazarus, J., entered a divorce decree, and from certain portions of that decree divorced wife appealed. The District Court of Appeal, Bray, J., held that portions of decree awarding divorced husband home, limiting divorced wife's occupancy of home, and awarding all of dry cleaning business and all of its bank accounts to divorced husband, were erroneous.

Decree reversed in part and affirmed in part.

1. Divorce 🔑296

Court has great discretion in dealing with custody of children in divorce actions.

2. Divorce 🔑300

Where divorce decree gave divorced husband right to visit once a week with child, whose custody was awarded to divorced wife, court did not act arbitrarily or unreasonably in requiring that child remain where it would be readily accessible to divorced husband and in prohibiting divorced wife from removing child from city and county except for limited periods.

3. Divorce 🔑296

Court did not abuse its discretion in limiting amount of support money, payable to divorced wife for support of four year old child, to $50 a month, though divorced husband had a net income in excess of $5,900 a year, plus additional income from his separate property, where divorced wife was not required to pay rental for abode of herself and child.

4. Divorce 🔑235

Where wife, who was awarded a divorce, had earned $300 a month, as bookkeeper at one time, she was physically sound, and had an insurance business which netted her about $700 a year, court did not abuse its discretion in awarding her alimony of only $100 a month for two years, though divorced husband had net income from business in excess of $5900 a year, plus an additional income from separate property.

5. Divorce 🔑184(10)

Where evidence did not compel a finding contrary to that of trial court in divorce suit, District Court of Appeals was bound by trial court's finding.

6. Husband and Wife 🔑262(1)

Moneys borrowed during marriage presumably become community property.

7. Husband and Wife 🔑249

In determining whether moneys borrowed by one spouse during marriage become community property or separate property, test is whether credit is advanced on personal credit or on credit of community property.

8. Husband and Wife 🔑262(1)

In divorce action against husband who purchased one fourth interest in cleaning business and gave seller note for part of purchase price, husband had burden of overcoming presumption that seller did not extend credit because of separate property of husband and, in absence of evidence on the subject, the presumption prevailed, and husband was not entitled to entire fourth interest on ground that it was his separate property.

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* Subsequent opinion 259 P.2d 656.

9. Husband and Wife ⚷259

In divorce action against husband who purchased one fourth interest in cleaning business and gave seller note for part of purchase price, trial court, in determining what portion of the fourth interest was husband's separate property and what part community property, should have apportioned to the community such share of husband's earnings from cleaning business as was due to husband's industry and skill.

10. Husband and Wife ⚷264

In divorce action against husband who purchased one fourth interest in cleaning business and gave seller note for part of purchase price, trial court, in determining what portion of the fourth interest was husband's separate property and what part community property, erred in finding that $3600 a year was the reasonable value of services of husband as experienced working partner in the cleaning business and that only $3600 received by him as income from the business was community property.

11. Husband and Wife ⚷262(1)

Except as against a bona fide purchaser for value, presumption that when title to property is in wife alone the property is her separate property, is disputable. Civ.Code, § 164.

12. Husband and Wife ⚷264

Whether evidence is sufficient to overthrow presumption that when title to property is in wife alone, the property is her separate property, is a question of fact. Civ.Code, § 164.

13. Husband and Wife ⚷249

In determining whether property, title to which is in name of wife alone, is her separate property, court may consider motive of husband for conveyance of property to wife and situation of parties at the time. Civ.Code, § 164.

14. Appeal and Error ⚷1010(1)

A determination by trial court that presumption that property, title to which is in wife alone, is her separate property, has been rebutted, is conclusive on reviewing court unless it is manifestly without support in the evidence. Civ.Code, § 164.

15. Husband and Wife ⚷264

Evidence as to source of funds used to purchase property, title to which is in wife alone, is not sufficient to rebut presumption that property is wife's separate property. Civ.Code, § 164.

16. Husband and Wife ⚷264

In order to overcome presumption that realty conveyed to husband and wife by joint tenancy deed is community property, there must be an intention or understanding of both of the spouses, rather than a secret intention or understanding of only one of the spouses.

17. Husband and Wife ⚷254

Where most of payments made for realty were separate funds of husband, rather than community funds, but deed was a joint tenancy deed, realty was community property, though it was husband's undisclosed intention not to make a gift of any interest in realty to wife.

18. Divorce ⚷254

An interlocutory divorce decree may not make division of community property immediately effective.

19. Divorce ⚷254

An erroneous provision in interlocutory divorce decree making division of community property immediately effective, is correctible by modification of the decree to provide for such disposition on entry of final decree.

20. Divorce ⚷278, 284

Determination by trial court in interlocutory divorce decree that certain property was separate property of husband was subject to right of appeal by divorced wife, and such determination could not be effective until appeal should be determined.

21. Divorce ⚷156

If there is a reconciliation of parties to divorce suit during period before entry of final divorce decree, entire interlocutory divorce decree will fall.

22. Divorce ⚷281

Fact that divorced wife remained in home after interlocutory divorce decree and accepted award of furniture in house, did not constitute a waiver by divorced wife of her right to appeal from provisions of divorce decree awarding certain property to divorced husband as his separate property, since award of furniture to divorced wife and determination of character of home would not become effective until entry of final divorce decree.

Leo R. Friedman, San Francisco, for appellant.

Jefferson E. Peyser, San Francisco, for respondent.

BRAY, Justice.

Plaintiff was granted an interlocutory judgment of divorce on the ground of extreme cruelty, awarding her custody of the minor child of the parties, certain support for herself and child, and disposing of the claimed separate property of the husband and community property of the parties. Plaintiff appeals from certain portions of said judgment hereafter set forth.

Main Questions Presented.

1. The correctness of the awards of support for plaintiff and the child, and the restrictions on its removal. 2. Sufficiency of the evidence to support the findings as to the character of the properties and their disposition. 3. The legal question of whether evidence of the husband's undisclosed intention is admissible to overcome the presumption concerning property purchased by his separate funds but placed by his direction in joint tenancy. 4. Effect of provisions immediately disposing of property. 5. Has plaintiff waived her right of appeal?

Record.

Plaintiff sued for separate maintenance, alleging grounds for divorce of extreme cruelty. Defendant cross-complained for a divorce on similar grounds. Later plaintiff amended her complaint to ask for a divorce. The court found for plaintiff on her charges of cruelty, against defendant on his, and awarded plaintiff custody of the child, giving defendant certain rights of visitation and limited temporary custody. Neither side complains of this action of the court. The findings and the portions of the decree which are attacked and the evidence concerning them respectively will be discussed seriatim.

1. (a) Removal of The Child.

[1, 2] The interlocutory decree prohibited plaintiff from removing the child from the city and county of San Francisco (where both parties reside) for any single period in excess of five days other than once a year when plaintiff may remove said child for a single continuous period of not to exceed three weeks. Defendant testified that plaintiff had threatened to take the child out of the city and out of the state and change his name. The decree provides that defendant may visit the child at all reasonable times and be entitled to have him at least one day in each week from 8 a. m. to 9 p. m. The court has great discretion in dealing with the custody of children in divorce actions. Browning v. Browning, 111 Cal.App. 99, 295 P. 360. The mother is permitted to take the child from the city for periods of five days at a time, and three weeks once a year. In view of the father's right to visit often and to have the child once a week, we cannot say the court acted arbitrarily or unreasonably in requiring that it remain where it will be readily accessible to its father. In the event, as suggested by plaintiff's counsel, it becomes necessary for the mother to establish her home in a nearby area, such as down the Peninsula, in Marin County, or elsewhere, we have no doubt that the trial court on application would sympathetically entertain a motion to modify the order.

1. (b) Support.

[3] The court awarded plaintiff $100 per month for her own support, limited to 24 months, and $50 per month for the support of the child. Plaintiff contends these awards constituted an abuse of discretion. The child at the time of trial was approximately 4 years old. The allowance of only $50 per month for support of a child by a father with a net income from the business of in excess of $5900 per year, plus an additional income from his separate property, seems inadequate. In view, however, of the fact

that, in effect, the mother has not been required to pay rental for the abode of herself and child, we cannot say that the court abused its discretion. The child is now of school age. Undoubtedly, upon application, the court will sympathetically review the support question as to the child's present needs and the father's income.

[4] Plaintiff was awarded most of the household furnishings, two bank accounts, the amounts of which do not appear in evidence, and the insurance business which nets her about $700 per year. Apparently plaintiff is physically sound. In April, 1947, when she quit working as a bookkeeper she was earning $300 per month. The award of $100 per month for two years will in some measure give her an opportunity to get readjusted. While the award is not on the generous side, we cannot say that under the circumstances here it constituted an abuse of discretion. Particularly is this so, now that plaintiff in the final decree will receive a substantial amount from the business.

2. The Helene French Cleaners.

The court found that defendant owned as his separate property a one-fourth interest in the business known as "Helene French Cleaners," that its purchase price was $11,500, the down payment of $1500 having come from defendant's separate funds; that defendant received as compensation for and reasonable value of his services $3600 per year, and that his one-fourth interest yielded a net return of $4000 which is a reasonable return on his investment of $11,500; that this return of $4000 was applied upon the purchase price of the one-fourth interest in the business; that no other moneys, community or separate, have been paid upon the purchase price. The court then set aside this business and all bank accounts belonging to it to defendant.

To ascertain the correctness of this determination, it is necessary to review the financial history of the parties. At the time of the marriage in 1938 plaintiff was working and continued to do so until April 15, 1947, shortly before the birth of the child. She earned from $280 to $300 per month. During the operation of the Owl Cleaners, hereafter mentioned, she kept its books and later helped in the Helene Cleaners for one month. About two years prior to the trial she established an insurance business netting her about $700 per year. Defendant, in 1938, operated the Pacific Avenue Cleaners. In 1943 he closed out the business and went into the service. Defendant claims that he derived $800 from the sale of its equipment which sum he kept in a joint account of himself and his mother.

Prior to 1938 defendant inherited from his father a half interest in two flats, a store and a cottage with three garages, on Pacific Avenue. His mother owned the other half. His mother occupied one flat, and for a few months early in their marriage the parties lived rent free in the cottage. They then moved into the flat with the mother. The property was subject to a mortgage, payable $50 per month plus interest. The fixed charges for the Pacific Avenue property were paid from its income plus a monthly allotment made by defendant to his mother while in the service. In September, 1947, defendant and his mother sold the property for $38,000. After payment of the mortgage and expenses, the net was $30,690.60, giving them $7,690.60 cash and a note secured by deed of trust for $23,000. In 1946, on returning from the service, defendant went into partnership with one Grinton. They purchased the Owl Cleaners for $4500. Plaintiff contributed $1500 towards the purchase price. $800 of this was from the sale of the Pacific Avenue Cleaners equipment, and the balance he borrowed from the joint account of himself and mother, giving her orally "one-half of the assets." Defendant never paid back this $700 nor did he account to his mother for any profits. In 1946 he drew $2000, in 1947 $3700, as salary, all of which except $10 or $15 per week was turned over to plaintiff for household expenses. Due to landlord trouble the Owl Cleaners was closed down in 1947. They "took a loss of about $3000 on equipment, furniture, etc. that we had to give it to the junk man." Just how much was salvaged from this business does not appear. The two partners then purchased into the Helene Cleaners. Defendant was to receive a one-fourth interest for $11,500. He paid $1500 cash which came from the Owl Cleaners and gave one Majoulet (from whom he purchased his interest) a note for $10,000, on which there is still due $6,000. In 1947 there was a net loss in the operation of the Helene Cleaners. Plaintiff and defendant lived on the few hundred dollars accounts receivable from the Owl Cleaners. In 1948 the business made a profit of around $27,000, or roughly $6500 per partner gross. Defendant drew $75 per week or $3900 for the year, and about $2000 was paid on the principal of the Majoulet note. In 1949 defendant also drew $75 per week. The gross profit of the business was $37,000, or roughly $9000 per partner. Net to defendant, in addition to his drawing $3900, was about $2000 which was paid on the Majoulet note. The trial was had in May, 1950.

[5–9] It is true that there is some confusion between defendant's testimony that he and his partner took a loss of $3000 upon the Owl Cleaners equipment and his statement that the $1500 down payment on the Helene Cleaners came from the liquidation of the Owl. While there is evidence from which the court could have found that the $1500 did not come from the Owl Cleaners, or if it did that it was community property, the evidence does not compel such finding and hence we are bound by the court's finding in that respect. The court's findings that the $1500 down payment on the Helene Cleaners came from defendant's separate funds, and that $4000 paid on the balance of the purchase price came from earnings of that business, are supported. This brings us to the question of whether the conclusion is justified that defendant's share of the earnings of the business should be credited, as between plaintiff and defendant, $3600 (actually he received $3900) per year to services and $2000 per year to earnings on his original investment of $1500. The return on defendant's services of course are community earnings. There is no evidence that the acceptance by Majoulet of the $10,000 note was because of the fact that defendant owned valuable separate property. In Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 138 P.2d 693, the money used by the wife in purchasing certain real property taken in her name alone was secured from her half-brother who had assisted her financially many times in the past. The court stated 59 Cal.App.2d at page 197, 138 P.2d at page 698: "* * * it is a reasonable inference that the loan was made solely on the personal credit of the wife." There is a presumption that moneys borrowed during the marriage become community property. Hogevoll v. Hogevoll, supra, 59 Cal.App.2d 188, 138 P.2d 693. The test is whether the credit is advanced upon personal credit or upon credit of the community property. Vandervort v. Godfrey, 58 Cal.App. 578, 208 P. 1017. Here the evidence fails to disclose upon what credit the loan was made, differing from the situation in the Hogevoll case, supra. Even though the Pacific Avenue property had recently been sold, there is no evidence to show that Majoulet knew of this fact. It is more reasonable to assume, in the absence of evidence on the subject, that it was made on defendant's earning ability and experience and knowledge of the type of business, as that it was made on the credit of defendant's separate property. Moreover, to infer that Majoulet extended the credit because of defendant's separate property is to assume without evidence that Majoulet knew of that property. Defendant had the burden of overcoming the presumption. He made no effort to produce evidence on the subject. Hence the presumption prevails. "The burden is upon the one who controverts the presumption to prove his claim regarding the character of property acquired during the marriage. Unless that contention is supported by satisfactory proof, the trial court is bound to decide the controversy in accordance with the presumption." Falk v. Falk, 48 Cal.App.2d 762, 767, 120 P.2d 714, 717. The court made no direct finding as to whether the credit was extended to defendant because of his separate property. Indirectly it so found because it stated that the $4000 applied by defendant on the loan "was and is a reasonable return for said period on defendant's investment of *$11,500.00* in said business."[1] Such finding is erroneous. It is obvious that in this type of business the capital which defendant placed in the business is not as important as the "personal activity, ability, and capacity of the husband". Estate of Gold, 170 Cal. 621, 623, 151 P. 12, 13. The situation here is similar to that where the husband's business is one he had before marriage. "It is settled by numerous decisions in this state that even though the husband's business has been carried on by him before marriage, and his profits after marriage are derived from the same business or from the investment and reinvestment of funds which he held at the time of the marriage, yet the entire profits so realized are not necessarily separate property of the husband. The capital which the husband brings to the marriage partnership is his own separate property, but it is a question for the court to determine what portion of the profits thereafter arises from the use of this capital and what part arises from the activity and personal ability of the husband. That portion of the income due to the 'personal character, energy, ability and capacity of the husband' is community property." Witaschek v. Witaschek, 56 Cal.App.2d 277, 281, 132 P.2d 600, 603. On return of the case the trial court will have to "apportion to the community such share of the husband's earnings as was due to the latter's industry and skill * * *." Witaschek v. Witaschek, supra, 56 Cal.App.2d at page 282, 132 P.2d at page 603. This will necessarily apply to earnings to date. Also the court will have to determine the present value of the community interest in the business. Further evidence, if available, may be introduced by either party on the retrial of this issue. The court will have to consider the community earnings and the present value of the community interest in this business in redetermining all of the community property of the parties and awarding plaintiff more than one-half thereof, effective on entry of the final decree.

[10] The court found that $3600 per year was and is the reasonable value of defendant's services. But this finding is erroneous, for two reasons: (1) The court allowed what would be an excessive return on the $1500 investment. (2) It is difficult to determine on what evidence the court made this finding. Apparently it was based on the wage paid "benzine men" which was about $3380 a year. Certainly the services of an active, experienced working partner were worth more than $220 per year more than the sums paid benzine men.

3. The Home.

Can defendant's undisclosed intent overcome the joint tenancy?

The court found that of the $3000 down payment on the home (the property at 1806 15th Avenue), which was purchased after marriage, $500 was paid from community funds, the balance and all subsequent payments from defendant's separate funds; that the title thereto was taken in joint tenancy but that defendant did not intend to make a gift of any present interest therein to plaintiff; that five-sixths is the separate property of defendant and one-sixth that of plaintiff. The decree awarded plaintiff a lien on the property for $2,375 in lieu of her one-sixth interest. While there is some uncertainty in the evidence as to whether all the subsequent payments on the home were made from defendant's separate moneys, there is sufficient evidence to support the court's finding that of the entire purchase price all but $500 came from that source. The real question is the effect of the joint tenancy deed. Plaintiff testified that she and defendant discussed how the title to the property was to be taken and "he told me it was going to be taken in both our names and that was the reason for me having to go down [to the title company at the time of the purchase] to sign the paper." Defendant testified that the joint tenancy deed was not made out at his instruction and that he had nothing to do with its preparation. It was prepared by the bank clerk. He testified he did not know and was not told the legal effect of such a deed. However, he stated that he left the matter to the title company who pointed out "about the survivorship, in case I passed away or Mrs. Gudelj passed away, that it would be easier to qualify for inheritance purposes * * it was discussed how I wanted it worded, about the survivorship, that was all. Just like when you open a bank account, they ask you whether you want either or survivorship." Over objection defendant was permitted to state that at no time did he intend to convey to plaintiff any present interest in the property. Defendant did not claim that he ever disclosed his intention to plaintiff. (In her complaint plaintiff claimed the home to be community property.) The evidence, then, discloses that defendant knew that the deed he was obtaining was a joint tenancy one and that at least it provided some sort of survivorship.

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[1] All italics added, unless otherwise noted.

[11–14] While generally the rules affecting joint tenancy deeds obtained by one or both spouses are well settled, there has been considerable confusion in the cases as to whether the undisclosed intention of the spouse obtaining the deed alone can overcome the presumption attaching to such a deed. The following quotations from DeBoer v. DeBoer, 111 Cal.App.2d 500, 504, 244 P.2d 953, 956, succinctly sum up the first mentioned rules. "When title is in the wife alone the presumption is that the property is her separate property. Civ. Code, § 164. Except as against a bona fide purchaser for value, the presumption is disputable. [Citation.] Whether the evidence against the presumption is sufficient to overthrow it, is a question of fact. [Citation.] * * * The court may consider the motive for the conveyance of property by a husband to his wife and the situation of the parties at the time. [Citation.] A determination by a trial court that the presumption has been rebutted is conclusive on a reviewing court unless it is manifestly without support in the evidence. [Citation.] * * * In determining whether property is community or separate property of the spouses, a trial judge is not bound by the form of the deed alone. [Citation.]"

[15] Another well settled rule is that evidence as to the source of the funds used to purchase the property standing alone is not sufficient to rebut the presumption. Cash v. Cash, 110 Cal.App.2d 534, 243 P. 2d 115; Barba v. Barba, 103 Cal.App. 2d 395, 229 P.2d 465; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905.

The DeBoer case states the rule as to which the cases are not in agreement: "In determining whether the transfer of separate property of the husband or of community property to the wife constituted a gift to the wife and changed the status of the property to that of separate property of the wife, the intention of the husband is 'the all-important and controlling question.' * * * Where title is taken in the name of the wife the testimony of the husband that he did not intend to make a gift of his separate property or of his interest in the community property, if believed by the court, is sufficient to overcome the presumption that the property is the separate property of the wife." 111 Cal.App.2d at page 505, 244 P.2d at page 956. Supporting this statement the following cases are cited: Horsman v. Maden, 48 Cal.App.2d 635, 640–641, 120 P.2d 92; Estate of Baer, 81 Cal.App.2d 830, 835, 185 P.2d 412; Nilson v. Sarment, 153 Cal. 524, 528–529, 96 P. 315; Fanning v. Green, 156 Cal. 279, 285, 104 P. 308; Whitaker v. Whitaker, 137 Cal.App. 396, 399, 30 P.2d 538; Stephenson v. Brand, 122 Cal.App. 543, 545, 10 P.2d 476.

In Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708, where joint tenancy property was purchased with separate funds of the husband, the husband was asked if by the joint tenancy he intended any interest in the property to vest in the wife during his lifetime. In holding that the question was proper the court said, 27 Cal.2d at page 789, 167 P.2d at page 711: "Plaintiff argues, however, that the undisclosed and secret intention of the husband not to make a gift to his wife cannot be established by parol evidence, citing Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507, and Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906, *but as indicated by the foregoing quotation from the record, defendant advised plaintiff of his intention* as to the first parcel of real property and it may be inferred that the placing of the other parcels in joint tenancy was done under like circumstances." Thus it appears that the plaintiff's intention in that case was not undisclosed as is the situation here.

On the other hand, in Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906, it was held that where a wife had joined with her husband in requesting that the title to property purchased with community funds be placed in joint tenancy, evidence of her secret and undisclosed intention that the property remain community property was inadmissible.

With this apparent conflict in the authorities we come to the latest opinion of the Supreme Court on the subject, Socol v. King, 36 Cal.2d 342, 223 P.2d 627. There the wife purchased certain real and personal property in the joint names of herself and husband with funds which were partly joint funds and partly her separate funds. "The findings establish that decedent believed that she had a one-half interest in the property in question which would descend to her children, but that there was no understanding between the parties that they held it other than as joint tenants." 36 Cal.2d at page 346, 223 P.2d at page 629. After referring to Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708, Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905, Horsman v. Maden, 48 Cal.App.2d 635, 120 P.2d 92, and Fanning v. Green, 156 Cal. 279, 104 P. 308, all supra, on other phases of the rules applicable to joint tenancies between spouses, the court said, 36 Cal.2d at page 346, 223 P.2d at page 629: "When there is an oral or written agreement as to the ownership of the property, LaMar v. LaMar, supra [30 Cal.2d 898, 186 P.2d 678]; Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443; Estate of Watkins, 16 Cal.2d 793, 795, 108 P.2d 417, 109 P.2d 1; Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; Rogers v. Rogers, supra [86 Cal.App.2d 817, 195 P.2d 890]; Tompkins v. Tompkins, supra [83 Cal.App.2d 71, 187 P.2d 840]; Wood v. Wood, supra [81 Cal.App.2d 727, 185 P.2d 53]; Cummins v. Cummins, 7 Cal.App.2d 294, 46 P.2d 284, or where such an understanding may be inferred from the conduct and declarations of the spouses, Huber v. Huber, supra; Tomaier v. Tomaier, supra; Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Hibernia Sav. & Loan Soc. v. DeRyana, 210 Cal. 532, 292 P. 632; Salveter v. Salveter, 206 Cal. 657, 275 P. 801; Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Fanning v. Green, 156 Cal. 279, 104 P. 308; Title Insurance & Trust Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Perdicalis v. Perdicalis, supra [92 Cal. App.2d 274, 206 P.2d 650]; Bassi v. Bassi, supra [89 Cal.App.2d 886, 202 P.2d 96]; Luminoso v. Luminoso, 75 Cal.App.2d 472, 171 P.2d 516; Estate of Wilson, 64 Cal. App.2d 123, 148 P.2d 390; Horsman v. Maden, 48 Cal.App.2d 635, 120 P.2d 92, it is true that the terms of the deed are not controlling. But where such circumstances do not exist, a true joint tenancy is created by a conveyance to husband and wife in that form, although the property is purchased with community funds [citations], or with the separate funds of the husband [citations]. When property is purchased with community funds and title is taken in joint tenancy at the request of the wife, *the secret intention of the wife that the property shall remain a part of the community is not effective.* 'She cannot defeat her act by testimony of a hidden intention not disclosed to the other party at the time of the execution of the document.' Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906, 907. *The same rule should be applied where joint funds are used to buy the property.* It follows that the trial court properly held that decedent's secret belief as to the legal result of procuring title to the California property in joint tenancy could not affect its actual status."

[16, 17] Thus it appears that in this case the Supreme Court has finally settled the conflict and reaffirmed the doctrine of Watson v. Peyton. It directly quoted from that case in support of its holding that the secret intention is not effective. It is significant, too, that in our case defendant claimed to have a mistaken belief, or a lack of knowledge of the legal result of procuring title in joint tenancy. In the Socol case it was held that such belief could not affect the actual status of the title. In the above excerpts from its opinion the court in effect characterized the Huber, Tomaier,

Fanning and Horsman cases (all of which were cited in DeBoer v. DeBoer, supra, 111 Cal.App.2d at page 505, 244 P.2d at page 956, as foundation for its opinion that undisclosed intention controlled) as support for the statement "where such an understanding may be inferred from the conduct and declarations of the *spouses* * * *." 36 Cal.2d at page 346, 223 P.2d at page 630. Note that "spouses" is plural. In our case there was no evidence whatever of any such understanding. Defendant did not claim there was such understanding, and plaintiff's testimony was that there was none such. The rule that in order to overcome the presumption raised by the form of the deed there must be an intention or understanding of the *parties,* rather than of one party, makes sense. To permit a spouse to testify in effect that while he procured a joint tenancy deed, he did so with the secret intention that it really was not to be such, and thereby avoid the effect of the deed, makes the presumption of no value whatever. There being here no evidence of any intention or understanding of the parties that the property should not vest in joint tenancy, the ruling of the court thereon was erroneous. As the plaintiff has a joint tenancy interest in the home, the provisions in the decree giving her a one-sixth interest in it, limiting her occupancy of it and fixing a penalty for her failure to surrender possession, fall.

4. Effect of immediate provisions of interlocutory decree.

[18–21] It is contended that because the interlocutory decree attempts to make immediate disposition of the property of the parties, that decree is void. It is well established that the interlocutory decree may not make the division of the *community* property immediately effective. Wilson v. Wilson, 76 Cal.App.2d 119, 172 P.2d 568. "*Immediately effective division of the community property in the interlocutory decree* was erroneous but is correctible by modification of the decree to provide for such disposition upon entry of the final decree. Slavich v. Slavich, 108 Cal.App.2d 451, 457, 239 P.2d 100; Wilson v. Wilson, 76 Cal.App.2d 119, 129–133, 172 P.2d 568." Dowd v. Dowd, 111 Cal.App.2d 760, 245 P.2d 339, 342, italics not added. We can find no authority for the proposition that in respect to the lack of immediate effect of the interlocutory decree there is any difference between the determination of *community* and *separate* property. Certainly the determination by the trial court in the interlocutory decree of separate property is subject to the right of appeal, and such determination, like any other judgment, cannot be effective until the appeal is determined. Moreover, if there should be a reconciliation of the parties during the period before entry of the final decree (one of the purposes of our law making divorces effective only upon entry of the final decree) the entire interlocutory decree would fall.

5. Has plaintiff waived right of appeal?

[22] Defendant contends that plaintiff has accepted the benefits of the interlocutory decree and hence waived her right of appeal, because (1) she has remained in the home over the 60 day period (all but two weeks of which had expired before the filing of the findings and interlocutory decree), and by so remaining, she in effect is accepting payment of the $2,375 awarded her in the monthly payments made by defendant on the mortgage; and (2) the decree awarded plaintiff the household furniture, furnishings and effects in the home, excepting the dining and living room rugs and one chair awarded defendant, even though the court found that they were 23⁄25ths defendant's separate property and only 2⁄25ths community property. Defendant has not appealed from this award, but contends that by remaining in the home and using this property plaintiff is accepting the fruits of the decree.

The award to plaintiff of the furniture and the determination of the character of the home do not become effective until the entry of the final decree. Hence, plaintiff has not accepted anything under the interlocutory decree. She has the right to keep matters in statu quo until the entry of the final decree.

Plaintiff is not appealing from other awards made defendant, so they have not been discussed in this opinion.

Those portions of the interlocutory judgment awarding defendant the home, limiting plaintiff's occupancy of it, and fixing a penalty, awarding all of the business known as "Helene French Cleaners" and all bank accounts belonging to it, and requiring defendant to pay installments on the mortgage, are reversed with instructions to the trial court to proceed as hereinbefore stated, to find that the home is held in joint tenancy, to determine the community share of the Helene Cleaners and make suitable award thereof to plaintiff, and to modify the interlocutory decree to make the awards of community and separate property effective only upon entry of the final decree. In all other respects the decree is affirmed. Defendant will pay costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

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114 Cal.App.2d 195

PEOPLE v. HATTON.

Cr. 2867.

District Court of Appeal, First District,
Division 2, California.
Nov. 13, 1952.

Defendant was convicted in the Superior Court, in and for the City and County of San Francisco, Twain Michelsen, J., of the unlawful possession of narcotics, and from the judgment and an order denying his motion for new trial, defendant appealed. The District Court of Appeal, Jones, J. pro tem., held that the evidence sustained conviction.

Order and judgment affirmed.

1. Criminal Law 🔑1134(3)

Contentions on appeal that trial court erred in denying motion to direct a verdict of not guilty for lack of evidence and that the evidence was insufficient to sustain conviction presented the single issue of the sufficiency of the evidence to sustain conviction.

2. Criminal Law 🔑1141(2)

Where appeal is based on alleged insufficiency of evidence to sustain findings of jury, appellant has the burden of demonstrating absence of any evidence of a sufficiently substantial character to support the verdict upon any reasonable hypothesis whatever and it is not enough that the established facts and circumstances may be reconciled with the innocence of accused.

3. Criminal Law 🔑1159(2)

In order to justify reversal of conviction on ground of insufficiency of the evidence, the facts must disclose no reasonable basis for any inference other than that of innocence of accused.

4. Criminal Law 🔑1144(13)

On appeal from conviction, all intendments are to be indulged in which will support the judgment to the exclusion of those tending to detract from it.

5. Poisons 🔑9

Evidence sustained conviction of unlawful possession of narcotics. Health and Safety Code, § 11500.

6. Criminal Law 🔑1159(2, 4)

The strength or weakness of the testimony and the credibility of witnesses are matters solely within the province of jury and if there is any substantial evidence to sustain its conclusion, reviewing court will not interfere.

Joseph A. Garry, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthurst, Deputy Atty. Gen., for respondent.

JONES, Justice pro tem.

Appellant was convicted of a violation of § 11500 of the Health and Safety Code of California—unlawful possession of narcotics—and appeals from the judgment of imprisonment imposed upon him and from the order denying his motion for a new trial.

[1] As grounds for reversal he urges that the court erred in denying his motion

to advise the jury to return a verdict of not guilty because of alleged lack of evidence, and, secondly, that the evidence is insufficient to sustain the verdict. There is thus presented the single issue of the sufficiency of the evidence to sustain the conviction. People v. Ward, 145 Cal. 736, 79 P. 448.

[2-4] When his appeal is on the ground that the evidence is not sufficient to sustain the finding of the jury, the burden is on appellant to demonstrate that there is no evidence of a sufficiently substantial character to support the verdict upon any reasonable hypothesis whatever. It is not enough that the established facts and circumstances may be reconciled with the innocence of the accused. Before a reversal may be had, the facts must disclose no reasonable basis for any inference other than appellant's innocence. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Hills, 30 Cal.2d 694, 185 P.2d 11; People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Finkelstin, 98 Cal.App.2d 545, 220 P.2d 934; People v. Boyd, 95 Cal.App.2d 831, 213 P.2d 724; People v. Todd, 91 Cal.App.2d 669, 205 P.2d 453; People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 613; People v. Hearn, 88 Cal.App.2d 146, 198 P.2d 305. On the appeal all intendments are to be indulged in which will support the judgment to the exclusion of those tending to detract from it. People v. De La Roi, 36 Cal.App.2d 287, 291, 97 P.2d 836. As is said in People v. Gutierrez, 35 Cal.2d 721, 727, 221 P.2d 22, 25, "After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. De La Roi, 36 Cal.App.2d 287, 97 P.2d 836."

The facts in this case as disclosed by the record are that on the afternoon of January 2nd, 1952, three officers of the San Francisco Police Department went to Room 20 of the Justice Hotel on Clay Street and found three men in the room. Ramerez, Goodfield and appellant, Hatton. The room was about ten feet by six feet and contained a bed, wash basin, dresser and closet. When the officers entered, appellant was standing backed up against the wash basin. A bindle of a half grain of heroin was fished out of the basin by the officers. The basin was still wet from water recently run through it.

On the dresser was an open knife with heroin on the blade. There was also spread on the dresser two pieces of old bindle paper, a tin cup, an eye dropper equipped to fit a hypodermic needle, a wire suitable for cleaning hypodermic needles, a spoon, a piece of cotton, a box of matches and a pair of tweezers. These articles are such as are ordinarily used in the preparation and injection of heroin into the blood stream, or for "sniffing" as inhaling is designated by addicts.

Appellant Hatton had fresh puncture marks on his right hand, Ramerez and Goodfield also bore puncture marks. All three men gave symptoms of being under the influence of a narcotic in that the pupils of the eyes of all three were pinpointed and those of Hatton and Goodfield frozen. In addition, Goodfield and Ramerez stated that narcotics were being administered in the room.

[5, 6] In the face of these facts it can not be consistently said that the jury was not warranted in drawing an inference that the appellant was in possession of the narcotic at the time and place charged, nor that the trial court upon the motion for a new trial was not warranted in finding them sufficient to sustain the conviction. It is said in People v. Wescott, 99 Cal.App.2d 711, 715, 222 P.2d 256, 258, that "The rule is too well established to warrant citation of authority that the strength or weakness of the testimony and the credibility of the witnesses were matters solely within the province of the jury, and that if there is any substantial evidence, contradicted or uncontradicted, to sustain its conclusion, a reviewing court will not interfere."

In our opinion the evidence which the record discloses and which tends to support the judgment is of sufficient substantiality to warrant the verdict.

The order and judgment appealed from are affirmed.

GOODELL, Acting P. J., and DOOLING, J., concur.

114 Cal.App.2d 44

HILL et al. v. STATE BOX CO.

Civ. 8167.

District Court of Appeal,

Third District, California.

Nov. 5, 1952.

Hearing Denied Dec. 29, 1952.

Action to enjoin cutting and removal of timber and to quiet title to certain timber. The Superoir Court, Nevada County, James Snell, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Schottky, J. pro tem., held that where contract by which plaintiffs' predecessor was to sell timber to defendant covered tract in which predecessor had but an indefinite interest, and terms of contract required predecessor to perfect such title, and required defendant to pay for timber purchased within four years, when plaintiffs' predecessor had failed to take any steps to establish his title within the four year period, he might not thereafter claim that defendant's right to timber had been forfeited by failure to cut and pay for same within four years, since plaintiffs' predecessor by his breach could not put defendant in default.

Judgment affirmed.

1. Logs and Logging 🔑3(14)

Vendor of timber who failed to perfect his indefinite title, as required by the sale contract, could not assert that purchaser's rights were lost by failure to cut and pay for timber within four years as required by the contract, where time was not made of essence of contract and purchaser was willing to cut and pay for timber upon reasonable assurance of vendor's title, and took steps to clear title when vendor failed to do so. Civ.Code § 1439.

2. Perpetuities 🔑4(1)

Rule as to perpetuities in connection with options was inapplicable to bilateral contract by which plaintiffs' predecessor had agreed to sell timber to defendant, including timber in tract in which predecessor had an indefinite interest which he agreed to clarify.

3. Logs and Logging 🔑3(7, 11)

Where time was not made the essence of contract by which plaintiffs' predecessor agreed to sell timber to defendant, including that on tract in which predecessor had an indefinite interest which he agreed to clarify, but payment for timber was to be made within four years, both parties had a reasonable time within which to perform.

4. Perpetuities 🔑4(1)

Vendor and Purchaser 🔑54, 75

One who becomes the vendee of a land-purchase contract, thereby acquires a vested equitable interest, and in absence of specification of date of performance, parties must perform that contract within a reasonable time, with results that no problem of application of rule against perpetuities is presented.

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Fred Pierce, Frank G. Finnegan, Sacramento, for appellants.

Dwyer & King, Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Appellants, as successors in interest of Eldon L. Cleveland, commenced an action to enjoin respondent, State Box Company, from cutting and removing timber from Section 27, T. 18 N., R. 11 E., in Nevada County, and to be quiet appellants' title to said timber.

Respondent filed an answer denying that appellants had any right to said timber and also filed a cross-complaint in which they asserted their right to said timber under a written contract entered into on June 5, 1944, between Cleveland and respondent, State Box Company.

Said agreement recited that Cleveland was the owner of six described parcels of land, and that he agreed to sell and respondent agreed to buy the merchantable timber on said land at certain specified price for the different varieties of timber. Respondent was to pay for the timber cut on the tenth of each month of operation, covering the last half of the preceding month, and on the twenty-fifth of each month covering the first half of such month. And, as an advance payment, a credit to the extent and in the amount of $20,000 upon anticipated production and upon the ultimate purchase price as determined by the true amount of such merchantable timber. Respondent agreed to pay, however, $10,000 in cash at the time of executing the agreement, receipt of which was acknowledged, and two notes of $5,000 each of even date, without interest, one to mature April 25, 1945 and the other July 1, 1945. Thereafter respondent was not to be called upon for further payments until $20,000 had been consumed in the quantity of timber cut, whereupon payments for timber cut would be made semi-monthly.

Paragraph 6 of the agreement reads as follows:

> "6. The parties agree that all timber shall be paid for by the State Box Company within four (4) years from the date hereof. This obligation prevails as against any provision above indicating otherwise. It is further agreed, however, that the State Box Company shall have and is hereby given a period of fourteen (14) years from the date hereof within which to cut and remove such merchantable timber, within which period State Box Company agrees to cut and remove the same. In the event that the State Box Company fails to cut and remove all of said merchantable timber within said fourteen-year period, it shall lose and forfeit any further right, title or interest in or to said timber, which shall thereupon revert to Eldon L. Cleveland, free of any claim by the State Box Company and all money theretofore paid by State Box Company to Eldon L. Cleveland shall be retained by him as liquidated damages for such breach. If the State Box Company does not cut and remove all of said merchantable timber within the period four years [written in ink] from the date hereof, the remaining merchantable timber on said premises shall be cruised by a timber cruiser sufficiently in advance of the date herein named for such final payment to permit such final payment to be made on said date and such final payment shall be made at the prices stipulated in the first paragraph of this Agreement upon the basis of such final cruise. If the United States Forestry Service will undertake such final cruise for the parties hereto, the United States Forestry Service shall be engaged for such work, and the expense shall be paid by the parties hereto half and half. If the United States Forestry Service will not undertake such final cruise, then the cruise shall be made by some competent timber cruiser satisfactory to both parties and the fee or expense of such cruise shall be upon both parties half and half. If the parties are unable to agree upon such a timber cruiser, the cruise shall be made by someone selected by State Box Company at its expense, with the privilege of reviewing and checking by Eldon L. Cleveland. The right of the State Box Company, after the expiration of the first four (4) years of this Agreement, shall, in the purchasing and cutting of timber, be limited to such quantity as was included in the said final cruise used as the basis for final payment hereunder."

All of the timber on these six parcels was cut and removed, and was fully paid for, and there is no dispute with reference thereto. The controversy involved in the instant case is over the timber on the parcel described in paragraph 12 of the agreement, which reads as follows:

> "12. Eldon L. Cleveland has an uncertain and undetermined interest in or claim upon that certain real property situate in the County of Nevada, State of California, and more particularly described as follows: NW¼, SW¼, W½ of SE¼ and S½ of NE¼ of Sec-

> tion 27, Township 18 North, Range 11 East, M. D. B. & M., less valid overlapping mining claims. In the event that Eldon L. Cleveland perfects title to said real property and the timber thereon or acquires or perfects title to the timber thereon, said timber shall become and shall be subject to the terms and provisions of the foregoing Agreement the same as though originally included in and made a part hereof, the said timber so located on said real property being treated as though originally described herein as part of the subject matter of this Agreement. Eldon L. Cleveland agrees to press and establish such right or interest as he may have in and to said timber so that the same, if such action on his part be successful, may be included as a part of this agreement."

The court found that respondent cut all the timber from said six parcels and overpaid Cleveland $4,605.80, that is, the initial payment of $20,000 was not used up in timber cut. The court also found that appellants acquired their title to the timber in Section 27 from Cleveland with full knowledge of the rights of respondent to cut timber; that Cleveland's title or claim to the timber in Section 27 "was uncertain and undetermined" and that Cleveland was bound and obligated "to press and establish such right or interest as he then had in the timber on said Section 27"; that Cleveland took no court action to quiet his title to the timber, and refused to press or establish his right or interest; that respondent was not obligated to pay Cleveland or his successors any money for timber in Section 27 until Cleveland established his title or interest to that timber; that Cleveland's title to the timber in Section 27 was established by reason of litigation arranged and conducted, not by Cleveland, but by respondent in the case of United States of America v. P. S. Waldron, Margaret A. Waldron, State Box Company, and Tahoe Sugar Pine Company, action No. 6105 in the United States District Court, wherein Judge Del M. Lemmon, on or about November 21, 1949, made his decision; that the issue of title to timber land in the Waldron case was the same as the title of Cleveland; that Cleveland took no part in the Waldron litigation, bore no expense thereof and contributed nothing; that the decision in the Waldron case made November 21, 1949, was subject to appeal by the United States but was finally settled on or about January 20, 1950 with the entry of an agreed modified judgment; that ever since the clearing of the title of Cleveland by the decision in the Waldron case respondent has been ready, willing and able to perform all the terms of the agreement of June 5, 1944, and so advised Cleveland and the appellants, and also Cal-Ida Lumber Company to whom appellants gave a contract for cutting the same timber.

The court also found that the agreement of June 5, 1944 is fair and reasonable; that there were 10,225,000 feet of timber on said Section 27 and the value thereof which respondent would have to pay to Cleveland or his successors amounts to $20,740.35; that on or about March 6, 1950 respondent, through Tahoe Sugar Pine Company, began cutting the timber on Section 27 and made a tender of $20,740.35 to Cleveland and to appellants, and on June 10, 1950 deposited that amount with the clerk of the court.

Judgment was entered in accordance with said findings, decreeing that plaintiffs and appellants take nothing against defendant and respondent; that the rights of plaintiffs and appellants are subordinate to the right of defendant and respondent to cut and remove all of the timber on said section 27; and that plaintiffs and appellants be restrained from cutting or removing any of said timber and from interfering with the cutting or removal of said timber by defendant and respondent.

Plaintiffs' motion for a new trial was denied and they have appealed from the judgment.

In arguing for a reversal of the judgment appellants outline their contentions as follows:

> "Can a contract for the sale of standing trees, which provides that the buyer must cruise and pay for same within four years, be extended to an in-

definite period beyond the prescribed time limit simply because the buyer is not satisfied with the seller's title.

"Is not such an extension of time invalid on each of the following grounds:

"I. As an erroneous construction of the actual language used by the parties in their written contract expressly limiting performance to a four-year period?

"II. As a misinterpretation of the contract in the light of the subsequent conduct and contemporaneous construction placed upon it by the parties which limited performance to a four-year period?

"III. As a violation of the Constitution Article XII, Section 9, and Civil Code, Sections 711, 715, 715.1 and 715.2, in that such a construction by the trial court makes it a perpetual motion?"

[1] Appellants then proceed to make an elaborate argument to the effect that under the language of the agreement performance by respondent was limited to a four year period. Their argument is ingenious but unconvincing because they omit the important facts found by the court, upon sufficient evidence, that their predecessor in interest, Cleveland, promised to perfect his admittedly defective title to the timber on Section 27 and took no steps to do so. They argue that respondent was obligated to pay for the timber on Section 27 within four years from the date of the contract, under paragraph 6 thereof, regardless of the title of Cleveland or of his lack of effort to establish his title. However, time was not made the essence of the contract, and even if it were, it is difficult to understand how it would be reasonable to expect respondent to cut and pay for the timber when Cleveland was unable to give satisfacory evidence of title. Indeed, on page 8 of their opening brief, appellants state:

"On July 17, 1947 [which was less than four years from date of the agreement], Lt. Cleveland came to the office of State Box bringing with him a preliminary title report of the California Pacific Title Insurance Company [Ex. H, R.T. 48]. In this report, the title examiner stated his opinion that Lt. Cleveland had not acquired a clear title to the Section 27 timber and that the title of the Federal Government was paramount.

"However, on this occasion, State Box told Cleveland that if he could get the title cleared up, State Box would go ahead and cut the timber [R.T. 48] and that title insurance would be accepted by it [R.T. 56]. Nothing was ever accomplished in this connection."

Thus it is clear from the record that respondent was willing to cut and pay for the timber on Section 27 just as soon as it had reasonable assurance that the timber was owned by Cleveland and that it took steps to clear the title when Cleveland failed to do so. The agreement was dated June 5, 1944, and Judge Lemmon's decision, as a result of which the title was cleared, was rendered on November 21, 1949, which was more than four years after the date of the contract.

It is clear also from the record that respondent did not at any time abandon its rights under the agreement. For on June 8, 1948, three days after the expiration of said four-year period, Cleveland wrote State Box Company that because of its failure to comply with paragraph 6 and particularly to cause the timber to be cruised sufficiently in advance of June 5, 1948 to permit the final payment, the entire agreement was cancelled and annulled.

Immediately thereafter, to wit, on June 11, 1948, Mr. Sumner Mering, attorney for State Box Company, wrote Cleveland and Cal-Ida Lumber Company, to whom Cleveland had given permission to cut the timber, telling them that State Box Company was determined to enforce its agreement with Cleveland and that Cleveland had been, up to this point, overpaid $4,605.80 on timber cut on said six parcels other than Section 27.

We are convinced that the court correctly determined that Cleveland had agreed to sell to respondent the timber on Section 27 and agreed also to take steps to clear his title thereto, and that Cleveland could not ignore his obligation to take such steps and then assert rightly that respondent's rights in said timber under said agreement were lost by the passing of time.

Section 1439 of the Civil Code reads in part:

> "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself".

In McElwee v. Beckwith, 198 Cal. 341, the court said at page 345, 244 P. 1084, at page 1085:

> "* * * The plaintiffs were not able to deliver to the defendant a clear title, nor an abstract showing clear title, as called for in the option agreement, and could not, therefore, put the defendant in default even if it be conceded that she was during that time unable to make the payment. Civ. Code, § 1439."

And in Mallett v. Doherty, 180 Cal. 225, the court said at page 230, 180 P. 531, at page 533, 15 A.L.R. 19:

> "* * * If the plaintiff was prevented by the defendant from going on the land and cutting the timber, the period of interruption should be taken into account and the term extended by operation of law for the time during which the plaintiff was so prevented from exercising his right."

Respondent cites two Missouri cases which appear to support its position. In Bank of New Madrid v. Bullock, 1944, 352 Mo. 710, 179 S.W.2d 81, 83, one Bullock as vendor agreed to convey certain land to one Ortman. It was recognized that Bullock's title was defective and in the contract Bullock agreed to clear his title. He did not clear his title and sought to have Ortman's rights in the contract forfeited. In specifically enforcing the contract against the vendor, Bullock, the court said:

> "* * * Ortman was at all times ready to comply with the contract. He in no way interfered with Bullock's effort to quiet the title. It happened that the land materially increased in value after Bullock contracted to sell the same to Ortman. The increase in value prompted Bullock's letter to Ortman on November 17, 1939. It was written in an effort to induce Ortman to cancel the contract."

The other case cited is Rogers v. Gruber, 1943, 351 Mo. 1033, 174 S.W.2d 830, which involved a vendor-vendee contract and vendor finally tried to avoid conveying. The buyer, Rogers, sued for specific performance. The contract obligated the vendee to pay on a certain date. Prior to the time of payment the parties recognized the vendor's title was defective and vendor agreed to perfect his title. After the title was cleared, the vendor refused to convey on the ground the vendee had failed to pay the price on the due date. The court granted specific performance to the vendee and held that the failure of the vendor to clear his title amounted to a waiver of the default of the vendee even in a contract where time was of the essence.

[2, 3] Finally appellants argue that respondent's interpretation of the agreement renders the agreement void as violative of the statute against perpetuities. In their argument on this point appellants erroneously refer to the contract as an "option." The rule as to perpetuities in connection with options has nothing to do with the bilateral contract here involved in which each party was bound to perform. Since time was not made of the essence, both parties had a reasonable time to perform. But this reasonable time rule did not give Cleveland the right to refuse to do anything and then by his own breach try to forfeit the rights of State Box Company. Had Cleveland proceeded with his obligation to attempt to clear his title within a reasonable time, particularly within the four years he now claims was the limit of time within which State Box Company had to pay the price, there would have been no controversy at all.

[4] We believe that it is correctly stated in 37 Cal.Law Review, at page 243, that: "The courts have never been troubled over the possible application of the Rule against Perpetuities to land-purchase contracts.

Nor should this matter perplex the courts, for it is clear that when one becomes the vendee of a land-purchase contract, he acquires thereby a vested equitable interest. The parties must perform the contract within a reasonable time when no date of performance is specified."

Appellants' argument upon this point is lacking in merit and the cases cited by them are not in point because in the instant case we are not dealing with an option but with a contract to sell and purchase timber within a specified time. Cleveland was obligated to take the necessary action to quiet his title to the timber and he delayed doing so until through the efforts of respondent in the Waldron case in which respondent was vitally interested, the title of Cleveland to the timber in Section 27 was established. We have been cited to no authority, and have found none, which would permit a party to a contract in the position of Cleveland to successfully claim a violation of the rule against perpetuities by first breaching his obligations under the contract and then seeking to rely upon delay caused by his own default.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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114 Cal.App.2d 181

In re GLASSFORD'S ESTATE.

DIBBLE et al. v. BROWN.

Civ. 19154.

District Court of Appeal, Second District,
Division 2, California.
Nov. 12, 1952.

Proceedings on petition of public administrator for probate of decedent's will and codicil and for letters of administration with will annexed. The Superior Court of Los Angeles County, J. F. Moroney, J., denied petition and petitioner appealed. The District Court of Appeal, Fox, J., held that estate of decedent located within California was subject to ancillary administration, even though decedent was domiciled in another state, and when only petition for letters filed was that of public administrator, denial of petition was an abuse of discretion.

Judgment reversed, with directions.

1. Wills 🔑249

Residence as used in section of Probate Code pertaining to jurisdiction of probate proceedings, is synonymous with domicile. Probate Code, § 301, Government Code, § 244(c).

2. Domicile 🔑4(2)

The concept of domicile involves the concurrence of physical presence in a particular place with the intention to make that place one's home, and the acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode.

3. Domicile 🔑4(1)

Domicile has a continuing quality in that a person cannot lose his domicile until another has been acquired.

4. Wills 🔑300

In proceeding on petition of public administrator for original probate of decedent's will and codicil, wherein executors of will opposed probate in California on ground that decedent was not resident of state within meaning of Probate Code, and it appeared that decedent had come to California with expressed intent to stay a year, record warranted conclusion that decedent had never intended thereafter to change her domicile to California from New York, notwithstanding filing of federal tax returns and transaction of other business in California. Probate Code, § 301; Government Code, § 244(c).

5. Domicile 🔑4(2)

Where testatrix who had removed to California with expressed intent to stay a year had stated, when informed that she had an incurable illness, that she would remain in California to die rather than return to New York, no intent to change domicile to California was thereby indicated, since choice was one of compulsion by circumstances. Probate Code, § 301; Government Code, § 244(c).

6. Executors and Administrators 🔑2

Each state is invested with plenary power to regulate the administration of the estates of deceased persons, in so far as the property of such persons is physically situated within its borders.

7. Descent and Distribution 🔑5
Executors and Administrators
🔑518(2), 519(1)

Although the law of the domicile of a nonresident decedent determines the right to succession and distribution of nonresident's personalty which has its physical situs in foreign jurisdiction, the existence of an estate belonging to a nonresident in a foreign state may subject it to an ancillary administration under the laws of such state, and state may, in order to prevent injury or inconvenience to local creditors, refuse to permit the property of a decedent to be withdrawn from its borders until debts due such creditors have been satisfied.

8. Executors and Administrators 🔑12

Under provision of Probate Code that wills must be proved, and letters of administration granted, and administration had, in Superior Court of county in which decedent died, leaving estate therein, court has jurisdiction to appoint an administrator of property located within county, regardless of decedent's domicile. Probate Code, § 301(2).

9. Wills 🔑251

The word "estate," when used in probate proceedings and statutes, is a comprehensive term ordinarily applied to describe in a most general fashion the property comprising the totality of assets and liabilities of a decedent. Probate Code, § 301(2).

See publication Words and Phrases, for other judicial constructions and definitions of "Estate".

10. Wills 🔑251

Under statute providing for probate of wills of nonresident decedents in county in which such persons died leaving an estate, bonds, checking account, and fur coat of decedent constituted an estate subject to administration. Probate Code, § 301(2).

11. Executors and Administrators 🔑12

A state where tangible or intangible property is located at the death of its owner has jurisdiction to administer it.

12. Executors and Administrators 🔑518(2)

The general rule as to bonds is that for the purposes of ancillary administration they may be treated as assets in the place where the documents are found.

13. Executors and Administrators 🔑24

Where nonresident died leaving assets in state subject to administration, and foreign executors failed to apply for letters of administration, denial of petition of public administrator for letters was an abuse of discretion and violation of statute pertaining to administration of estates of nonresident decedents. Probate Code, § 301 and subd. (2).

14. Executors and Administrators 🔑518(1)

Purpose of allowing ancillary administration is to prevent local creditors and claimants from being compelled to present their claims in another forum and from being compelled to accept unenforceable assurances of payment by foreign executors which may later be repudiated when assets are situated in state which may properly be applied to satisfy the claims.

◆

Harold W. Kennedy, County Counsel, and Baldo M. Kristovich, Deputy County Counsel, Los Angeles, for appellant Public Administrator.

Gibson, Dunn & Crutcher, Richard E. Davis and Frank L. Mallory, Frank J. Kashare, and Millard M. Mier, Los Angeles, for respondents.

FOX, Justice.

The Public Administrator appeals from a judgment dismissing his petition for probate of decedent's will and codicil and for letters of administration with-will-annexed.

The decedent, Grace Glassford, a widow, was for many years a resident of and domiciled in New York City. In October, 1948, she came west "thinking," as she later stated, that she would remain a year. She arrived in Denver, Colorado, the latter part of October, living there at a hotel until the middle of January, 1949, when she came to Los Angeles. She stayed two weeks at the Biltmore Hotel; a month at the Wm. Penn Hotel; and slightly less than two months at the DuBarry Apartment Hotel. In registering at each hotel she gave her address as the Gramarcy Park Hotel, New York, and at each she took her room on a day-rate basis. During her stay at the DuBarry she spent ten days at the California Lutheran Hospital. Finally, she spent 22 days at the Shatto Sanitarium, where she died on May 21, 1949.

Upon her arrival here decedent opened a checking account at a bank near her hotel. When she moved to the DuBarry she closed that account and opened another at a branch of the same bank in the vicinity of the DuBarry, giving the latter as her address. She also gave the DuBarry as her address when she entered the hospital.

On February 9, 1949, the decedent wrote a letter to the manager of the Tuscany Hotel in New York in which she stated: "I am a New Yorker but came West the last of October thinking I would remain a year. However, the urge to return is pretty strong and strangely enough I feel better in New York than I do here." She then asked whether the Tuscany would have room for her soon and what its rates would be, adding that she would need time to secure a room reservation on the train for four nights and to pack her trunk. On March 14, 1949, while Mrs. Glassford was in the hospital, her income tax return for 1948 was filed with the Collector of Internal Revenue at Los Angeles, and her address given as the DuBarry.

Shortly before she left the hospital on March 22, 1949, her physician advised her that she was suffering from an inoperable, far-advanced cancer and had only a few weeks to live. On that occasion her doctor said to her, "Your home is in New York, and your folks live in New York, and I think you ought to go back to them because you are not going to live long, and it would be pleasanter for you to be with your relatives and friends when you die than to be here among strangers." After leaving the hospital Mrs. Glassford told one of the clerks at the DuBarry that the doctor had told her she was going to die and should return to her relatives in New York, but it didn't make sense to her to go home just to die; that she did not want to be a burden to her sister since she had plenty to do without worrying about her; and that she intended to stay here and die. In a conference with her attorney regarding a codicil to her will, at the sanitarium shortly before her passing in May, Mrs. Glassford said she did not intend to go back east; that there was no reason for her to do so; and that she did not think her condition would permit the trip.

On April 1, 1949, Mrs. Glassford made application for ten $1,000 U. S. Government bonds. On April 12 she rented a safe deposit box at the bank where she carried her checking account, and on April 23 she stored her fur coat at Bullock's Wilshire. On each of these occasions she gave the DuBarry as her address.

At the time of Mrs. Glassford's death there were in her safe deposit box in Los Angeles U. S. Government bonds of the approximate value of $58,000 and $3,000 in her checking account. Her fur coat, valued at $1,000, was in storage.

Decedent's will was admitted to probate in New York in October, 1949, but a purported codicil was denied probate in September, 1950. All the interested parties in the will and purported codicil appeared in the New York proceedings.

In May, 1950, the Public Administrator of Los Angeles County was appointed Special Administrator of decedent's estate and in the following October he was appointed Special Administrator with general powers. He took possession of the property, published notice to creditors, and filed inventory and appraisement. Bullock's filed a claim for $105, and the County of Los

Angeles has a claim for 1949-50 personal property and solvent credits taxes amounting to approximately $62. Meanwhile, on August 31, 1950, the Public Administrator had filed a petition for probate of the will and codicil and for letters of administration with-will-annexed. On October 9, 1950, decedent's sister and nieces, individually, and her sister and brother-in-law, as executors of her will, filed grounds of opposition to the probate of the will and purported codicil, alleging that the decedent was a resident of New York at the time of her death, that her will had already been admitted to probate in New York, and that the probate court here had no jurisdiction to admit the will and codicil to probate and grant letters of administration. Following a trial of the issues raised by the petition for probate and the opposition thereto, a judgment was entered dismissing the petition of the Public Administrator.

[1, 3] The court found Mrs. Glassford was not a resident of Los Angeles County at the time of her death but that she was a resident of New York. The Public Administrator challenges the sufficiency of the evidence to support this finding. The challenge, however, is not well founded. While residence has different meanings for different purposes, Restatement, Conflict of Laws, sec. 9(e), it is plain that residence as used in section 301, Probate Code, is synonymous with domicile. The concept of domicile involves the concurrence of physical presence in a particular place with the intention to make that place one's home. "The acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode." DeYoung v. DeYoung, 27 Cal.2d 521, 524, 165 P.2d 457, 458. The judicial concept of domicile is essentially equivalent to the lay idea of home. Restatement, Conflict of Laws, sec. 12; 61 Harv.L.Rev. 1234. It embodies a disposition towards permanence, an attitude of attachment. See Texas v. Florida, 306 U.S. 398, 425–426, 59 S.Ct. 563, 830, 83 L.Ed. 817; District of Columbia v. Murphy, 314 U.S. 441, 455, 62 S.Ct. 303, 86 L.Ed. 329. Also, domicile has a continuing quality because a person always has a domicile and does not lose one until another is acquired. Restatement, Conflict of Laws, sec. 23; Gov't Code, sec. 244(c).

[4] It is clear that up to February 9, 1949, when Mrs. Glassford wrote the manager of the Tuscany Hotel in New York regarding a room and their rates, she was still domiciled in New York. It is claimed, however, by the Public Administrator, that her acts and attitude thereafter demonstrate an unmistakable intention to change her domicile to California. The significance of these matters must be determined in the light of Mrs. Glassford's current situation and condition.

The first event to which our attention is directed is that on March 7th Mrs. Glassford transferred her checking account to a branch of her bank which was in the immediate vicinity of the DuBarry, to which she had moved three days previously, and that she gave the DuBarry as her address. The transfer of her account was simply a matter of convenience, and, of course, she would naturally give the bank the address of the place where she was staying so as to facilitate communication. This was a normal course of conduct and without significance on the question of an intention to change her domicile to California. In this connection it should be noted that she was living at the DuBarry on a day-rate basis. On March 13 she entered the hospital. Her income tax return was filed for her on the following day with the Collector of Internal Revenue at Los Angeles, and it gave the DuBarry as her address. In view of the approaching deadline for filing the return, the distance between Los Angeles and New York, and Mrs Glassford's physical condition, it is entirely likely that the return was filed here as a matter of convenience and without any thought that it would have any effect upon her domicile.

[5] It was shortly before decedent left the hospital on March 22nd that she was

advised by her doctor that she had only a few weeks to live. He suggested that she return to her home and relatives in New York. The critical nature of her illness is emphasized by the fact that she passed away two months later, on May 21st. She was apparently resigned to the prognosis of her doctor and realized her physical inability to travel across the country. It was in this state of desperation and helplessness that she expressed the thought that she would remain here and die. "But knowledge that one will never again be able, on account of illness, to return home does not necessarily establish a change of domicile." Beale on Conflict of Laws, Vol. 1, p. 173. It is also pointed out by Professor Beale, page 175, supra, that "The mere fact that an invalid has given up the hope of returning to his old home, so long as he retains his feeling for it, is not tantamount to an intent to make a new home." Under these circumstances the trial court could reasonably conclude that decedent's determination to remain here until she died was not a free choice on her part but compelled by circumstances over which she had no control; that her stay in California was not for an indefinite period, being originally limited to one year, and later, when advised of her mortal illness, limited by an expected event (her death) which although uncertain in time was controlled by existing facts of which she had knowledge. See United States v. Luria, D.C., 184 F. 643, 651. It is apparent that her stay here was dictated by expediency, for a temporary and limited purpose, and with no thought, purpose or intent of establishing a home here.

The Public Administrator points to the fact that in April (after being advised of her condition by her doctor), decedent gave the DuBarry as her address in an application for the purchase of War Bonds; when renting a safe deposit box at her bank, and when storing her fur coat at Bullock's Wilshire. These were all transactions in which it was important and appropriate that the other party know where she was living and consequently where she could be reached. This is illustrated by the fact that after decedent went to the sanitarium the bank struck out the former address and inserted as her address that of the sanitarium. Decedent's use, therefore, of her Los Angeles address in these transactions was not of compelling significance.

Finally, our attention is directed to a conference at the sanitarium on May 13th (eight days before her death) with her attorney regarding a codicil to her will. In response to his inquiry as to where her home was, she replied, "Well, I live here. I have no other place to live." That was, of course, literally true, but it does not necessarily mean that she had changed, or then intended to change, her domicile to California. It rather expressed her resignation to the reality with which she was faced.

From all the facts, the trial court could reasonably draw the inference that the decedent never intended to change her domicile to California, hence she was domiciled in New York at the time of her death. Consequently, the court properly refused to grant the petition to the Public Administrator for an original probate of decedent's will and codicil since she was not domiciled here at the time she passed away.

The Public Administrator's second ground of appeal is that, regardless of the decedent's domicile, the court had jurisdiction to appoint an administrator by virtue of section 301 of the Probate Code, which provides: "Wills must be proved, and letters * * * of administration granted and administration * * * had, in the superior court: * * * (2) Of the county in which the decedent died, leaving estate therein, * * *." The Public Administrator contends that since Mrs. Glassford died in Los Angeles County leaving an estate within the meaning of the statute, as well as unpaid local creditors, the court abused its discretion in denying his petition for probate of the will and for letters of administration with the will annexed. This argument is well taken.

[6, 7] It is generally recognized that each state is invested with plenary power to regulate the administration of the estates of deceased persons, so far as the property of such persons physically situated within its borders is concerned. In re Estate of

Clark, 148 Cal. 108, 112, 82 P. 760, 1 L.R.A., N.S., 996; In re Estate of Estrem, 16 Cal. 2d 563, 567–568, 107 P.2d 36. Although the law of the domicile of a nonresident decedent determines the right to succession and distribution of the personal property of such person which has its physical situs in a foreign jurisdiction, In re Estate of Hodges, 170 Cal. 492, 495, 150 P. 344, L.R.A.1916A, 837; In re Estate of Barton, 196 Cal. 508, 512, 238 P. 681, the existence of an estate belonging to a nonresident decedent in a foreign state may make it subject to an ancillary administration under the laws of such state. Murphy v. Crouse, 135 Cal. 14, 19, 66 P. 971; In re Estate of Edelman, 148 Cal. 233, 239, 82 P. 962. One of the dominant purposes of an ancillary administration is the collection and conservation of a decedent's domestic assets for the benefit of local creditors. Murphy v. Crouse, supra; Curtis v. Schell, 129 Cal. 208, 220, 61 P. 951; 11(b) Cal.Jur., p. 854, sec. 1336. To prevent injury or inconvenience to local creditors, a state may refuse to permit the property of a decedent to be withdrawn from its borders until debts due such creditors have been satisfied. Baker v. Baker, Eccles & Co., 242 U.S. 394, 401, 37 S.Ct. 152, 61 L.Ed. 386; Murphy v. Crouse, supra.

[8–10] In the light of these general principles of law and the specific provisions of section 301(2) of the Probate Code, it is manifest that if Mrs. Glassford left an estate here it was properly susceptible of local administration to achieve the objects hitherto noted. The word "estate," when used in probate proceedings and statutes, is a comprehensive term and is ordinarily applied to describe in a most general fashion the property comprising the assets of a deceased. In re Estate of O'Gorman, 161 Cal. 654, 658, 120 P. 33; Security-First National Bank v. Stack, 32 Cal.App.2d 586, 593, 90 P.2d 337. It is an expression employed to encompass the totality of the assets and liabilities of a decedent. Tanner v. Best's Estate, 40 Cal.App.2d 442, 445, 104 P.2d 1084. It is inextricably bound up with the concept of property, and as characterized by the court in California Trust Co. v. Anderson, 91 Cal.App.2d 832, 838, 205 P.2d 1127, 1130, adopting the definition of "estate" as given in Webster's New International Dictionary: "* * * the word 'estate' may mean 'property,' or 'The degree, quality, nature and extent of one's interest in, or ownership' of property, real or personal." The word property is a generic term, and "is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate * * * whether corporeal or incorporeal * * *. The word is sometimes used in the sense of 'estate.' * * *" Hunt v. Authier, 28 Cal.2d 288, 295, 169 P.2d 913, 917, 171 A.L.R. 1379, quoting from Ponsonby v. Sacramento Suburban Fruit Lands Co., 210 Cal. 229, 232, 291 P. 167. We are satisfied that all the items of property over which the Public Administrator acquired control under his special letters of administration constituted assets comprising a part of decedent's estate in the sense that this word is used in Probate Code section 301 authorizing the appointment of an administrator. In re Estate of Waits, 23 Cal.2d 676, 680, 146 P.2d 5.

[11, 12] This conclusion is supported quite apart from the language of Probate Code section 301(2). A state where tangible property is located at the death of its owner has jurisdiction to administer it. State of Iowa v. Slimmer, 248 U.S. 115, 120–121, 39 S.Ct. 33, 63 L.Ed. 158. The general rule as to bonds is that for purposes of ancillary administration they may be treated as assets in the place where the documents are found. State of Iowa v. Slimmer, supra; 3 Beale, Conflict of Laws, p. 1480, sec 471. See In re Estate of Robinson, 19 Cal.2d 534, 121 P.2d 734, where letters of administration were issued on estate of nonresident claimed to consist of U. S. bonds. So, also, for the founding of a local administration, a debt is assets at the domicile of the debtor, McCully v. Cooper, 114 Cal. 258, 262, 46 P. 82, 35 L.R.A. 492; In re Estate of Waits, supra, and administration of bank deposits may be had as a part of the estate in the state where the bank is located. Gregory v. Lansing, 115 Minn. 73, 131 N.W. 1010, 1011; In re Smith's Estate, 55 Wyo. 181, 97 P.2d 677,

684; 3 Beale, Conflict of Laws, p. 1487; 2 Woerner American Law of Administration, p. 679, sec. 205.

[13, 14] Reverting to the situation before the court based on the allegations in the petition, the grounds of opposition raised by contestants, and the facts elicited at the hearing, it is clear that the court's recognition of the validity of the New York proceedings admitting the will to original probate there as the place of Mrs. Glassford's domicile, was not an obstacle to its ancillary probate in Los Angeles County. By the plain language of Probate Code section 301(2), wills of nonresident decedents must be proved and administration undertaken in the county in which such person died leaving an estate. The executors having failed to apply for the letters of administration, they waived their rights thereto, Prob. Code, sec. 324, and the court was bound to grant letters in the priority established by the Probate Code, secs. 409, 422. The Public Administrator was the only petitioner for such letters and the court had no choice but to grant them. To deny them, in the face of the fact that administration had already been properly undertaken by the Public Administrator, and costs incurred for which the estate was liable and in view of the existence of unpaid creditors, was a clear abuse of the court's discretion. The court acted in disregard of the statute which provides for the administration of the property contained in the estate of a nonresident decedent, Prob.Code, sec. 301(2), and contrary to the policies underlying ancillary administration long announced by our courts. Curtis v. Schell, 129 Cal. 208, 220, 61 P. 951; Murphy v. Crouse, 135 Cal. 14, 19, 66 P. 971. Local creditors and claimants need not be compelled to present their claims in another forum nor accept unenforceable assurances of payment by foreign executors which may later be repudiated while assets are situated in this state which may properly be applied to satisfy the obligations against the estate. See In re Estate of Card, 64 Cal.App. 268, 272, 222 P. 145.

Contestants rely on In re Estate of Daughaday, 168 Cal. 63, 141 P. 929, as authority for the proposition that the Probate Court has jurisdiction to refuse to grant probate and letters of administration where no useful purpose would be served thereby. It will be noted that the court recognized that protection of local creditors was one of the main purposes of administration, 168 Cal. at page 71, 141 P. at page 933, but that problem was not before the court. In that case it was held that the asserted claim was so "visionary and unsubstantial" as to have no reasonable and colorable value and could not be made the basis for a grant of ancillary letters of administration. The court further pointed out that petitioner's place of remedy was in a court of equity, not a probate court. These factors are in diametric opposition to the situation presented in the instant case and serve to distinguish it.

Other cases cited by contestants, In re Estate of Hodges, supra; Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424, and In re Estate of Layton, 217 Cal. 451, 19 P.2d 793, 91 A.L.R. 480, are of no assistance to them. While these cases establish that California follows the doctrine of *mobilia sequuntur personam* so far as taxation and distribution of and succession to the personal property of a nonresident decedent is concerned, they contain no suggestion that tangible or intangible personal property is not susceptible of ancillary administration in the state where it has its physical situs.

For the foregoing reasons, the judgment must be reversed, with directions to admit the witnessed will to probate as a foreign will, and to issue letters of administration with the will annexed to the Public Administrator.

MOORE, P. J., and McCOMB, J., concur.

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114 Cal.App.2d 246

GRIFFIN v. COMPERE et ux.

Civ. 15220.

District Court of Appeal, First District, Division 1, California.

Nov. 18, 1952.

Action to recover a deficiency judgment on a promissory note secured by chattel mortgage after private sale of the security. The Superior Court, City and County of San Francisco, Arthur Coats, J., entered judgment favorable to plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held that even if record showed that there had been a prior foreclosure action that was dismissed, the showing would not as a matter of law constitute such an election of remedies that would preclude a later private sale and suit for the deficiency.

Affirmed.

1. Appeal and Error 🔑901

When record on appeal consisted of judgment roll alone, appellant was required to show error from the record.

2. Chattel Mortgages 🔑255

Even if record in action to recover deficiency judgment on a promissory note secured by chattel mortgage showed that there had been a prior foreclosure action that was dismissed, the showing would not as a matter of law constitute such an election of remedies that would preclude a later private sale and a suit for a deficiency.

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Albert D. Elledge, San Francisco, for appellants.

A. Don Duncan, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action against defendants to recover a deficiency judgment on a promissory note secured by a chattel mortgage after private sale of the security. Defendants appeal on the judgment roll alone.

In their five-page opening brief appellants urge that there was a prior foreclosure action, which was later dismissed, and contend that the bringing of such action, under section 726 of the Code of Civil Procedure, constituted a binding election of remedies that barred, as a matter of law, the bringing of the present action for the deficiency remaining after a subsequent private sale of the security. When respondent, quite properly, pointed out that the facts to support this defense, which he challenged, did not appear in the record of the present judgment roll appeal, appellants countered with a motion to augment the present record by including the complete record of the prior foreclosure action, apparently introduced as an exhibit in the present action. That motion was denied. However, over objection of the counsel for respondent, counsel for appellants was then informed by this court that if he desired to move to convert the judgment roll appeal into a full record appeal, the court, subject to conditions, would look with favor upon such motion. Counsel elected not to make such motion and requested that the appeal be submitted on the judgment roll.

[1] The defense here sought to be raised—i. e., election of remedies—was not pleaded by appellants in the trial court, although there is a reference to the prior foreclosure action in the pleadings of other defendants not parties to this appeal. It is incumbent, of course, on appellants to show error from the record. Utz v. Aureguy, 109 Cal.App.2d 803, 241 P.2d 639; Nulsen v. Nulsen, 84 Cal.App.2d 306, 190 P.2d 316. This, they have failed to do.

[2] Moreover, even if the record did show, which it does not, that there had been a prior foreclosure action that was dismissed, that would not constitute, as a matter of law, such an election of remedies so as to preclude a later private sale and a suit for a deficiency. Commercial Centre R. Co. v. Superior Ct., 7 Cal.2d 121, 59 P.2d 978, 107 A.L.R. 714; Nelson v. Bank of America, 76 Cal.App.2d 501, 173 P.2d 322; Baumann v. Harrison, 46 Cal.App.2d 84, 115 P.2d 530; Flack v. Boland, 11 Cal.2d 103, 77 P.2d 1090; Carpenter v. Hamilton, 59 Cal.App.2d 146, 138 P.2d 353; Carpenter v. Title Ins. & Trust Co., 71 Cal.App.2d 593, 163 P.2d 73; see, generally, 6 A.L.R.2d 10.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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114 Cal.App.2d 271

QUISTGARD v. DERBY et al.

Civ. 8152.

District Court of Appeal, Third District, California.

Nov. 19, 1952.

Action by broker to recover commission alleged to be due from defendants by reason of their failure to perform written agreement by which broker was to procure purchaser for defendants' property. The Superior Court, Sonoma County, Donald Geary, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding that broker had been guilty of making misrepresentations, with actual knowledge of their falsity, for purpose of inducing defendants to sign sale agreement, and that the parties were in a fiduciary relationship.

Judgment affirmed.

1. Brokers 🔑86(7)

In action by broker to recover commission wherein broker contended that he had procured purchaser, but that vendors had without cause refused to perform, and vendors contended that broker had misrepresented value of property to be exchanged for theirs, and had made false representations for purpose of inducing them to sign exchange agreement, evidence sustained findings that false representations were made by broker, with actual knowledge of their falsity, to induce vendors to sign agreement, and that the parties were in a fiduciary relationship.

2. Brokers 🔑65(1)

Real estate broker who had agreed to procure purchaser for property of defendants, stood in a fiduciary relationship with defendants, and had duty to make full disclosure to them of all material facts concerning the transaction which might affect their decision, and failure of broker to make full disclosure of comments of party whose approval was made prerequisite to consummation of sale by defendants, and misrepresentation that such party had given his consent to transaction, was such a fraud on defendants as would preclude broker from recovering any compensation. Civ.Code, § 2230.

George E. Dilley, Santa Rosa, John R. Jacobson, Robles del Rio, of counsel, for appellant.

R. M. Quackenbush and Paul Golis, Santa Rosa, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in favor of defendants in an action instituted by plaintiff to recover a real estate broker's commission alleged to be due him from defendants by reason of their failure to perform a written agreement between the parties.

Although three contentions are made they are not separately stated but are treated as one: that the evidence is insufficient to support the findings. From our examination of the record, viewing it as we must in the light most favorable to respondents, we find nothing to warrant our interference with the judgment as entered by the trial court.

The allegations of the complaint are that plaintiff entered into a written agree-men with defendants; that by the terms thereof defendants agreed to pay him a commission for effecting a sale or exchange of certain property owned by defendants in Sonoma county; that pursuant to said agreement he procured a purchaser of defendants' property; that thereafter an exchange agreement was entered into between defendants and Dave Moskowite and his wife Laura, the prospective purchasers; that the said Moskowites complied with all of the terms of said agreement and were ready and willing to complete the transaction but that defendants without cause refused to perform said agreement, thereby depriving him of the commission due from said defendants in the sum of $1,000 and the commission of $500 from said Moskowites.

[1] By their answer defendants in effect admitted the material allegations of the complaint relative to the execution of the agreement but denied that there was any money owing to plaintiff for the reasons set forth in their affirmative defense, which were (1) that plaintiff misrepresented the value of the property to be exchanged for theirs, and (2) that it was understood by all parties that an exchange of defendants' property could not be effected unless first approved by defendant S. R. Derby's father, H. S. Gutermute, beneficiary of the second deed of trust on the Derby property; that plaintiff represented to defendants that Gutermute had stated that the exchange was a profitable transaction for defendants; that Gutermute and his wife had agreed in writing to the transfer of his deed of trust; that said statements were false and untrue and made for the purpose of inducing respondents to sign said exchange agreement; that defendants would not otherwise have signed and in fact did sign the same only because of said fraudulent representations of plaintiff; that upon discovering the fraud they gave notice to plaintiff and to the owners of the other property that the exchange could not be effected because of the refusal by Gutermute to transfer his deed of trust.

As noted by the trial judge in his order for findings, the testimony of the parties was in direct conflict. Bearing in mind, however, the oft repeated rule that the testimony must be viewed in the light most favorable to respondent our examination of the record leaves no doubt but that the evidence was more than sufficient to support the essential findings of the trial court—that the alleged misrepresentations were made by plaintiff to defendants; that the misrepresentations were made with actual knowledge of their falsity; that the misrepresentations were made to defendants to induce them to sign the agreement and that the parties were in a fiduciary relationship.

Under the circumstances it would appear unnecessary to summarize the evidence at length. Suffice it to say that the plaintiff's testimony was to the effect that he knew nothing concerning the second trust deed held by Gutermute nor was the same discussed prior to the signing of the listing agreement and that at no time was there any understanding that the transaction was dependent upon the approval of Gutermute. However, on cross-examination he did state that at the time the property was listed Mrs. Derby informed him there was a small obligation with a member of the family but it was not to be considered and would be handled by them personally. He further testified that Gutermute had stated to him that "He thought it might be a good deal" and that he had told defendants that Gutermute had said he "thought it was a good deal." Mr. Gutermute testified that he "didn't think much of the deal;" that he had "decided absolutely I wanted nothing more to do with it" and that he "never signed anything." Defendant Bertha M. Derby testified that before she and her husband first inspected the proposed exchange property she advised plaintiff that Gutermute had a second deed of trust and that the same would have to be satisfied before any deal could be made. She further testified that when she and her husband signed the exchange agreement the plaintiff came to their home and exhibited a paper upon which appeared two signatures, and referring to the Gutermutes said, "They have signed and it is up to you; you haven't enough in it and you might as well." Mr. Derby also corroborated his wife's testimony as to the statement attributed to the plaintiff. Plaintiff did not deny making such a statement. Derby further stated that the plaintiff had shown him a piece of scratch paper on which were various figures; that they were sitting at a table in the defendants' living room, and that plaintiff went into the figures in detail, explaining the transaction to them, and that when, during the course of their conversation, he suggested that they should call his father "and find out if agreeable with him before we sign anything", the plaintiff replied, "Oh, no, don't bother and antagonize the old man."

On cross-examination plaintiff testified that he did not recall using a scratch paper in his discussion with the defendants but admitted that the figures thereon were made by him. His explanation of his acts in this regard was that such figures had to do only with the amount of Revenue stamps which would be necessary in the event the property was exchanged as proposed.

As stated in Darrow v. Robert A. Klien & Co., Inc., 111 Cal.App. 310, 316, 295 P. 566, 568:

> "The duties and obligations of an agent are many. The relationship of an agent to his principal is of a fiduciary nature similar in many respects to the relationship between a trustee and his beneficiary. The relationship not only imposes upon the agent the duty of acting with the highest good faith, but likewise precludes him from obtaining an advantage over the principal in any transaction had by virtue of the agency."

[2] Here it is not denied that plaintiff, as agent, stood in a fiduciary relationship with his principals, the defendants, see Langford v. Thomas, 200 Cal. 192, 252 P. 602, 376, and as such was under a duty to make a full disclosure to his principals "of all material facts concerning the transaction that might affect the principal's decision." Rattray v. Scudder, 28 Cal.2d 214, 223, 169 P.2d 371, 376, 164 A.L.R. 1356; see also Civ.Code, Sec. 2230. Hence it follows that his act, not alone of failing to make full disclosure to defendants of the comments of Gutermute but his complete distortion of such statements as well as his misrepresentation that Gutermute had given his consent to the transaction was such a fraud upon defendants as would preclude him of his right to any compensation. Chain v. Katze, 62 Cal.App. 615, 617, 217 P. 578.

Viewing the facts and circumstances presented by the record before us in the light of the rules above mentioned it is readily apparent that there was ample evidence to sustain the determination of the trial court.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, Justice pro tem., concur.

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114 Cal.App.2d 240

REININGER et al. v. ELDON MFG. CO.

Civ. 19017.

District Court of Appeal, Second District, Division 3, California.

Nov. 17, 1952.

Hearing Denied Jan. 15, 1953.

Action by sellers to recover balance due on a sales contract, wherein buyer filed counterclaim and cross-complaint for damages for breach of warranty. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that retention of defective goods by buyer did not preclude recovery of damages for breach of warranty of which sellers had been given prompt notice.

Judgment reversed with directions.

1. Appeal and Error ⚷907(3)

On appeal on the judgment roll alone from a judgment for the balance due on a sales contract, findings that goods delivered under contract were defective were conclusive.

2. Appeal and Error 🔑172(1)

Where sellers pleaded full performance of contract to furnish specified dies and so proceeded at trial of action for balance due on contract and cross-complaint for damages suffered because of defective quality of the dies delivered, sellers could not for the first time on appeal contend that buyer's actions with respect to dies prevented or excused further performance.

3. Sales 🔑445(6)

Mere acceptance of defective goods with knowledge of their defects did not cut off buyer's right of action for breach of express warranty as a matter of law, even before adoption of Uniform Sales Act. Civ. Code, § 1769.

4. Sales 🔑261(6)

Warranty and representation by sellers that dies to be furnished would be fit for buyer's use in making boxes according to drawings furnished by buyer constituted an "express warranty". Civ.Code, § 1732.

See publication Words and Phrases, for other judicial constructions and definitions of "Express Warranty".

5. Sales 🔑1(1)

Dies to be made by seller for use by buyer in the manufacture of boxes were "goods" within purview of Uniform Sales Act. Civ.Code, § 1725.

See publication Words and Phrases, for other judicial constructions and definitions of "Goods".

6. Sales 🔑288(2)

The purpose of notice required by Uniform Sales Act in order that acceptance of goods by buyer shall not discharge seller from liability for breach of promise or warranty is to advise seller that he must meet a claim for damages as to which the law requires that he shall have early warning. Civ.Code, § 1769.

7. Sales 🔑288(2)

Retention by buyer of defective dies delivered under sales contract and exercise of dominion over such dies by attempting to rework them did not preclude recovery of damages for breach of express warranty by sellers that dies would be fit for use in making boxes according to drawings furnished by buyer, where sellers had been given prompt notice of breach and an opportunity to correct the defects but were unable to do so. Civ.Code, §§ 1732, 1769.

8. Appeal and Error 🔑1176(1)

Where trial court found that goods delivered under sales contract were defective in breach of express warranty and that as a result of such breach, of which sellers were given prompt notice, buyer had suffered damages in stated amount in excess of balance due on contract, but erroneously concluded that retention of goods by buyer precluded recovery of such damages, judgment for balance due on contract should be reversed with directions to amend conclusions of law to conform to opinion, set off unpaid balance of contract price against damage suffered by buyer and enter judgment for buyer for the balance. Civ.Code, §§ 1732, 1769.

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Loeb & Loeb, Alfred I. Rothman, Los Angeles, of counsel, for appellant.

Lester V. Peterman and Charles P. Lester, Pasadena, for respondents.

SHINN, Presiding Justice.

This is an action brought by sellers for the balance due on a sales contract. Contending the products delivered were of such poor quality as to be useless the buyer-defendant counterclaimed and also filed a cross complaint seeking damages. Judgment was entered for plaintiffs for the balance due and against defendant on the cross complaint. Defendant appeals.

The sole question presented on this appeal, which is on the judgment roll alone, is whether a buyer who keeps the goods delivered under a sales contract but promptly notifies the seller that goods delivered are defective may maintain an action for damages suffered because of the defective quality of the goods. The trial court found that the goods here in question were wholly defective and that the buyer so notified the seller, but concluded that the act of accepting the goods and exercising dominion over them by attempting to rework them precluded any claim of damage by the buyer. No question is here raised of the propriety of the judgment insofar as it awarded plaintiffs the amount of the balance of the contract price. The contention of appellant is that it should have been awarded damages. There is thus presented a clear question of the proper application of section 1769 of the Civil Code.[1]

[1] The court found the following facts: On April 5, 1950, by written contract,[2] plaintiffs agreed to make two dies to be used in the manufacture of the base and cover of a Styrene box; at the time of the agreement plaintiffs were given drawings for the finished boxes; the next day defendant furnished a drawing of the proposed dies. The court found, however, that the contract was made on the basis of the box and cover drawings and not the die drawing and that the box and cover drawings were sufficient to enable a die maker to make dies from which the box could be made. Sales price for the dies was fixed at $5,250 with a proviso that if delivery were made on or before May 12, 1950 the price would be increased $100 per day of early delivery and if delivery was after May 12, 1950 the price would be decreased $150 for each day's delay. Defendant deposited $2,500 with the order. The two dies were successively delivered on May 4th and May 6th, 1950. Sample boxes were run from the dies and the samples were not in accordance with the drawings furnished and were unusable. Defendant immediately notified plaintiffs of the defects and returned the dies for correction. On May 9, 1950, the dies were redelivered and samples again were made. These also were defective and unusable and the dies were found to have a salvage value of only $100. The dies not only would not make the box and cover according to drawing but were not in conformance with the die drawings furnished by defendant. The inability to produce acceptable samples was due to defects in the dies. Plaintiffs contend the dies were good and there were no defects but the court found against plaintiff on these issues, and upon a judgment roll appeal these findings are conclusive.

The court found further that notice in writing was given by defendant to plaintiffs on May 10, 1950, specifying that both the dies and samples made therefrom were not in accordance with the contract, that defendant would send the dies elsewhere for necessary correction and would hold plaintiffs responsible for any and all damages sustained. On receiving the notice plaintiffs informed defendant that they objected to the dies being sent elsewhere for correction. The dies were sent to a qualified die maker but all efforts at correction were unsuccessful. The court found that by reason of the defective dies defendant sustained various items of damage in the total sum of $9,203.09.

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[1] "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

[2] "Purchase Agreement

To: Ability Products Co.,
2036 Lincoln
Pasadena, California

1. Upon the terms and conditions herein contained, we agree to purchase from you the following described personal property.

A. One (1) 4-cavity die to make covers of Styrene Box, as per drawings furnished.

B. One (1) 4-cavity die to make bases of Styrene Box, as per drawings furnished.

2. Contract price: $5,250.00

3. Terms of payment: $2,500.00 down; final payment after approval of samples and dies by Eldon.

4. Delivery date:

Die (A) – May 12, 1950
Die (B) – May 5, 1950

5. Shipping instructions: Delivery by your truck at our plant.

6. Subject to delay caused by fire, flood, strike or other causes beyond your control, we shall be entitled to the sum of $150.00 for each day final delivery of both dies is delayed beyond May 12, 1950, it being agreed that it would be impracticable to fix the actual damage suffered by us by reason of such delay. Eldon will pay the sum of $100.00 above the contract price for each day final delivery of both dies is made before May 12, 1950.

Please sign and return to us the enclosed copy of this agreement.

Eldon Manufacturing Co.
By /s/ Robert Silverstein

Accepted:
By /s/ Earl A. Jackson
Seller."

The only question presented is whether the findings support the judgment. There is nothing in the findings to indicate express or implied approval by defendant of the goods tendered by plaintiffs in satisfaction of their contract.

[2] Appellant contends that the judgment is not supported by the findings since those above summarized required the court under Civil Code, section 1769, to allow defendant damages as found. Respondents do not answer this contention. They contend that since they had until May 12, 1950, to deliver proper dies the act of defendant in taking possession of the dies on May 10, 1950, and sending them elsewhere prevented and excused further performance. However, since plaintiffs pleaded full performance on their part and so proceeded at trial, they may not raise for the first time on appeal an excuse for nonperformance or claim prevention of performance. Daley v. Russ, 86 Cal. 114, 117, 24 P. 867; Peek v. Steinberg, 163 Cal. 127, 133, 124 P. 834.

[3] Prior to the Uniform Sales Act it was a pure question of fact whether the receipt and retention by the buyer was made in such a way as to indicate he was assenting to the tender of nonconforming goods. It has never been the law in California that mere acceptance of defective goods with knowledge of their defects cuts off a buyer's right of action for breach of an express warranty as a matter of law. North Alaska, etc., Co. v. Hobbs, Wall & Co., 159 Cal. 380, 383, 113 P. 870, 120 P. 27, 35 L.R.A.,N.S., 501. There were no findings that defendant waived the defects; all findings were to the contrary.

[4, 5] There have been no cases since adoption of the Uniform Sales Act indicating any change in this rule; the cases rather indicate that when a buyer has complied with the statutory notice requirements he has a cause of action for breach of warranty express or implied. The court found that plaintiff warranted and represented that the dies would be fit for defendant's use in making the boxes according to the drawings. This was an express warranty, Civ. Code, § 1732, and the articles to be manufactured were "goods" within the purview of the Uniform Sales Act, Civ.Code, § 1725.

A discussion of § 49 of the Uniform Sales Act, which is identical with § 1769 of the Civil Code, is found in 3 Williston on Contracts, § 714, where it is said:

> "This section of the Statute [§ 49] amounts to this, that the seller's tender of the goods is treated as an offer of them in full satisfaction, but the buyer is allowed a reasonable time for accepting the offer. Moreover, if he declines to take the goods in full satisfaction he need not return them. The practical advantages of the statutory rule and its ease and certainty of application commend it.
>
> "The section differs from other provisions of the Statute in changing substantially the common law of all or nearly all of the states. * * * [M]any states hold that at common law acceptance of title necessarily involves a release of the seller's liability from certain of his contractual obligations in regard to the goods. In other states this is denied unless there is an intent to surrender the seller's obligations. Under the common law as expounded in both of these classes of jurisdictions great difficulties in determining questions of fact are inevitable. * * * Subject to this requirement [prompt notice], the buyer's right against the seller is not destroyed by acceptance of title."

Since adoption of the Uniform Sales Act in 1931 only two prior California cases have considered the question of a buyer's right to damages after acceptance of defective goods. Whitfield v. Jessup, 31 Cal.2d 826, 193 P.2d 1; Ice Bowl, Inc., v. Spalding Sales Corp., 56 Cal.App.2d 918, 133 P.2d 846. Both of them involved only the question of prompt notice but both recognized that the statute, Civ.Code, § 1769, gives the buyer a right to sue despite acceptance if he has given the required notice.

[6, 7] Plaintiffs contend that the purpose of the notice requirement in the statute is to allow the seller time to rework the goods and that he was given insufficient opportunity to rework them. A complete answer to this contention is given by Whitfield v. Jessup, supra, 31 Cal.2d 826, 830, 193 P.2d 1, 3: "It is doubtful that the seller has any such right. * * * But if that is a reason for the notice requirement it is not the only reason. As stated in Columbia Axle Co. v. American Automobile Ins. Co., 6 Cir., 63 F.2d 206, at page 207: 'While it may be one purpose of the notice required by the statute to permit the seller to make inspection of the goods, whether in the hands of the vendee or not, it is certainly not its only purpose. "The purpose of the notice", said Judge Learned Hand, "is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning."' American Mfg. Co. v. United States Shipping Board, etc., 2 Cir., 7 F.2d 565." Moreover, plaintiffs were given one opportunity to correct the defects and were unable to do so. Thereafter defendant sent the dies to an engineering company the court found to be "an experienced and qualified die maker" and also made a good faith effort to correct the defects in its own die shop. The case is one envisioned by the statute. Defendant was not precluded from recovering the damage sustained as a result of plaintiff's breach of contract.

Defendant seeks not only a reversal of the judgment but also a direction that judgment be entered in its favor for damages in accordance with the findings. It was found that as a result of plaintiffs' breach of the contract defendant had suffered damage in the amount of $9,203.09. Although defendant in its opening brief insisted that upon reversal judgment should be entered in its favor, plaintiffs have made no reply to that demand, nor have they indicated in any manner that a direction to amend the conclusions of law and to enter a different judgment would be improper.

[8] The judgment is reversed with directions to amend the conclusions of law to conform to this opinion, to set off the unpaid balance of the contract price against the damage of defendant and cross complainant and to enter judgment for the latter for the balance.

WOOD and VALLÉE, JJ., concur.

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114 Cal.App.2d 278

PEOPLE v. NAUMCHEFF (two cases).

Cr. 920, 921.

District Court of Appeal, Fourth District, California.

Nov. 19, 1952.

Defendant was convicted in the Superior Court, Orange County, Kenneth E. Morrison, J., of grand theft in two consolidated cases and he appealed from judgment in one case and from order denying motion for new trial in the other. The District Court of Appeal, Barnard, P. J., held, inter alia, where there is direct evidence of a crime, and any circumstantial evidence received is incidental to and corroborative of the direct evidence, it is not reversible error to fail to give instruction on the matter of circumstantial evidence.

Judgment affirmed.

1. Constitutional Law 🔑46(1)

Where jury found charge of prior felony conviction to be true but defendant was not adjudged an habitual criminal, Habitual Criminal Act had no direct application and question of constitutionality thereof was academic. Pen.Code, § 668; Const. art. 1, § 11; U.S.C.A.Const. art. 4, § 2.

2. Constitutional Law 🔑207(1)

Criminal Law 🔑1201

Statutes 🔑87

Both punishment for offense and impeachment are matters for state determination, and rules thereon established by habitual criminal act apply to everyone alike.

Pen.Code, § 668; Const. art. 1, § 11; U.S.C.A.Const. art. 4, § 2.

3. Criminal Law ⚷1202(4)

Instructions which required jury to find whether or not allegations of prior convictions were true and whether or not defendant had previously been convicted of forgery in another state and had served term of imprisonment therefor in state penitentiary were not objectionable on ground that jury was not instructed as to nature and characteristics of a felony. Pen.Code, § 17.

4. Criminal Law ⚷814(17)

When there is direct evidence of a crime and any circumstantial evidence received is incidental to and corroborative of the direct evidence, it is not reversible error to fail to fully instruct on circumstantial evidence.

5. Criminal Law ⚷829(15)

Where facts as to offenses of grand theft charged were testified to directly by bank personnel and direct evidence including identification of defendant was ample to sustain conviction, failure to fully instruct on circumstantial evidence was not prejudicial, in view of instructions given.

6. Criminal Law ⚷825(4), 829(13)

Failure to give instruction that evidence of prior felony conviction had been received for limited purpose of impeaching credibility of testifying defendant was not prejudicial, in view of instruction given and absence of request for further instruction.

◆

James C. Monroe, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with grand theft in taking certain money from the Bank of America. In a separate information, he was charged with grand theft in taking certain money from the Security-First National Bank of Los Angeles. In each information he was also charged with a prior felony conviction in Oregon, for forgery, resulting in a term of imprisonment in the Oregon State Penitentiary. In each case the defendant pleaded not guilty, and denied the prior conviction. By stipulation, the cases were consolidated for trial. A jury found him guilty as charged in both cases, and found the charge of prior conviction to be true. Separate judgments were entered sentencing the defendant to prison, but each judgment provided that he was not adjudged an habitual criminal. He has appealed from the judgment in one case and from an order denying his motion for a new trial in the other.

[1, 2] The appellant first contends that section 668 of the Penal Code is unconstitutional in that it violates Article 4, Section 2 of the United States Constitution and Article 1, Section 11 of the California Constitution, which provide that the citizens of each state are entitled to equal privileges and immunities, and that laws of a general nature shall have a uniform operation. It is argued that section 668 draws an invalid distinction between one convicted of a crime in California and one convicted of a crime in another state, since that section applies to a crime which *could* have been punished as a felony in this state, although it was actually punished as a misdemeanor in the other state in which it was committed.

The question thus raised is academic here since the evidence shows, without dispute, that the appellant had been convicted of forgery in Oregon and had served a term in the penitentiary of that state as a result of that conviction. No unconstitutionality appears insofar as this statute affects the appellant. People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331. He was not adjudged an habitual criminal, and the provisions of section 668 have no direct application here. People v. Gutkowsky, 100 Cal.App.2d 635, 224 P.2d 95. Moreover, the matter of a prior conviction relates only to punishment for a crime committed in this state, and to its use for purposes of impeachment. Both punishment and impeachment are matters for state determination, and the rules established apply to everyone alike. See In re Rosencrantz, 205 Cal. 534, 271 P. 902.

[3] It is next contended that the jury was not instructed "as to the nature and characteristics of a felony," with the result that it was called upon to decide the issue as to a prior felony conviction without having the definition of a felony to guide it in its deliberations. By the instructions and the forms of verdict submitted the jury was told that, in addition to the issue as to the offense being tried, it was to find whether or not the allegations of a prior conviction were true, and whether or not the appellant had previously been convicted of forgery in Oregon and had served a term of imprisonment therefor in the state penitentiary of that state. In effect, the jury was thus required to find whether or not the prior conviction met the requisites of section 17 of the Penal Code, and no possible prejudice appears.

[4, 5] It is next contended that the court erred in failing to give an instruction on circumstantial evidence based on the appellant's theory "that the jury would disbelieve the testimony of People's witnesses, leaving the People's case purely one of circumstantial evidence." The appellant relies on People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812; and People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469. In all of these cases circumstantial evidence was not only a crucial factor but the only evidence there was. However, when there is direct evidence of a crime, and any circumstantial evidence received is incidental to and corroborative of the direct evidence, it is not reversible error to fail to fully instruct on the matter of circumstantial evidence. People v. Jerman, 29 Cal.2d 189, 173 P.2d 805; People v. De Voe, 123 Cal. App. 233, 11 P.2d 26. In this case, the facts as to the offenses charged were testified to directly by the bank personnel, two witnesses as to each offense, and the direct evidence, including the identification of the appellant, was ample to sustain the verdicts. The only circumstantial evidence involved was the testimony of two handwriting experts, one for the People and one for the appellant. The jury was instructed that it was to consider the opinion of a duly qualified expert, with the reasons given therefor; that they were not bound to accept the opinion of an expert as conclusive; and that they should give to such an opinion the weight to which they found it to be entitled. The jury was also instructed "that if from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case, it is your duty to adopt the one of innocence and find the defendant not guilty." The jury was sufficiently instructed in this regard, in view of the evidence, and no prejudicial error appears.

[6] The final contention is that the jury should have been instructed that evidence of a prior felony conviction had been received for the limited purpose of impeaching "the credibility of the testifying defendant." The jury was instructed that the fact that a witness had been convicted of a felony, if such was a fact, might be considered in judging the credibility of that witness; that the fact of such conviction would not necessarily destroy or impair the witness' credibility and would not raise the presumption that the witness had testified falsely; that this was simply one of the circumstances to be taken into consideration in weighing the testimony of such a witness; and that this rule would apply equally to the defendant or to any other witness. No other instruction in this regard was requested, and no prejudice appears.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

114 Cal.App.2d 159

KING et al. v. INTERNATIONAL UNION OF OPERATING ENGINEERS et al.

Civ. 19052.

District Court of Appeal, Second District,
Division 1, California.

Nov. 12, 1952.

As Modified on Denial of Rehearing
Dec. 1, 1952.

Hearing Denied Jan. 8, 1953.

Representative action by local union members against their international organization for declaratory relief. The Superior Court of Los Angeles County, Henry M. Willis, J., dismissed the action; plaintiffs appealed. The District Court of Appeal, Doran, J., held that the action was barred under the doctrine of res judicata.

Judgment affirmed.

1. Judgment 🔑715(1)

Where prior litigation in representative capacity by members of local union against their international union raised the same issues as in present action, though prior decision was based on failure to exhaust intra-organizational remedies, the prior decision was res judicata.

2. Judgment 🔑713(2)

A final judgment on the merits between parties who in law are the same operates as a bar to subsequent action upon the same cause and determines both issues that were raised and those that could have been raised in the first action.

3. Judgment 🔑720

A judgment is res judicata in a later action between the same parties even though the issue decided arises in a different connection.

4. Judgment 🔑677

Judgments in representative actions brought by authorized representatives bind the entire class, even subsequent members, as well as the litigants.

5. Judgment 🔑677

Trade union members not personally involved in earlier class suit but represented by other members could not raise questions in present action that could have been decided in prior action, since the prior judgment was res judicata as to them as class members.

6. Labor Relations 🔑91

Where local union's autonomous rights were suspended during supervision by international, by-laws were not illegal, though not adopted at regular local meeting in accordance with constitutional provision applicable to autonomous local unions.

7. Labor Relations 🔑91

Requirement of trade union constitution that by-laws be adopted by a majority vote was met when majority of all those participating in the election approved by-laws.

Aaron Sapiro, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, William H. Thomas, Cleveland, Ohio, for respondents.

DORAN, Justice.

The complaint herein, for declaratory relief, was filed by plaintiffs as members of the defendant International Union of Operating Engineers and Local Union No. 12, both unincorporated associations. The dispute and controversy concern certain new by-laws which plaintiffs claim are invalid "because of express violations of the basic Constitution in their contents, and by reason of the invalid method of adoption". Plaintiffs contend that "Local No. 12 is entitled to immediate self-rule, under the basic Constitution; and that an officer of the Court should be appointed to take over the operations of the Local Union from the International Representatives and to take all steps necessary to place the membership in democratic control of their Local Union No. 12".

Among other defenses, the answer pleads *res judicata,* in that the issues of the present case "have been tried and adjudicated against their (plaintiff's) contentions and prayer in the case of Klippel v. International Union of Operating Engineers, (Superior Court, Los Angeles County, No. 568419) * * * commenced by members of the defendant International and Local No. 12 who purported to act and were found by the Court to have acted on behalf of members (thereof) as these plaintiffs claim to be doing; that there also appeared in that action certain intervenors who also alleged that they were acting for and on behalf of the members * * *".

In the Klippel action just mentioned, Superior Court Judge Paul Nourse, on February 14, 1951, decided against the plaintiffs' contentions and found that although the International and its officers had failed to perform their duties in respect to carrying out "the steps necessary to terminate International supervision and to restore to Local No. 12 and its members" the rights granted under charter and constitution, "said wrongs are wrongs within the Union"; that remedy exists for said wrongs, to-wit, a petition to the President of the International to terminate International supervision and if that be denied, an appeal to the Executive Board of the International;" that plaintiffs had not pursued said remedies; that the intervenors had attempted to pursue said remedies by filing a petition but that the International President had denied such petition and that an appeal to the Executive Board was then pending; and that "the evidence fails to establish by a preponderance that said appeal is futile or useless".

The judgment in the Klippel case ordered "that this action should be and is hereby dismissed without prejudice to the commencement of a new action, should defendant International fail within a reasonable time after the 30th day of June, 1951, to restore to Local No. 12 full control over its property and affairs, subject only to the provisions of the Constitution of defendant International", and ordered International to "account to Local No. 12 for the funds and property, both real and personal, now and heretofore held by defendant International as trustee for Local No. 12".

In defendant's answer to the present complaint it is affirmatively alleged "that the present action is prematurely brought in that it has been commenced before June 30, 1951 (filed March 7, 1951), up to which time it has been decreed by a court of competent jurisdiction, (the Klippel case) in a decree expressly binding upon all members of Local No. 12, including these plaintiffs, that defendants are entitled to proceed with the establishment of local autonomy under the By-Laws referred to in this action".

The present action came on for hearing before Judge Henry M. Willis on October 3, 1951, upon a Stipulation of Facts, in which it was stipulated "that the files in the Klippel action shall be placed in evidence herein by reference", including findings of fact, conclusions of law and judgment. The only testimony taken was that of defendants' witnesses, William H. Thomas, General Counsel for the International, and Philip A. Judd, Recording Secretary of Local No. 12.

Plaintiffs now appeal from the judgment entered by Judge Willis, holding that "this action is barred by the plea and proof of res judicata founded upon the record and judgment in case No. 568419 (the Klippel case) * * *; that this action is subject to abatement and dismissal under the plea of estoppel of plaintiffs to prosecute the same by reason of failure to exhaust remedies provided in the Constitution of the International Union; that this action was commenced prematurely and should be dismissed for lack of statement of facts in the complaint herein, sufficient under the limitations of the judgment in case No. 568419 to constitute a cause of action thereby permitted, or to confer jurisdiction in this court to entertain this action".

The controversy herein dates back to the year 1939 when at the request of various local unions to the respondent International, these unions were consolidated into one large local, from which time Local Union No. 12 existed and functioned as a supervised local, without autonomy, under the direction of International in accordance with Article VI, Section 3 of the International Constitution relating to supervised locals.

The International comprises a membership of some 150,000 persons throughout the United States; Local Union No. 12, having its principal office in Los Angeles, has a membership of approximately 10,000 persons. Since 1950, one Ralph Bronson has been International Supervisor of Local No. 12, by appointment from the General President of International, and as such

Supervisor appointed all officers, etc. of the Local. Members of Local No. 12 have had no right to elect officers or representatives, to designate dues or to control property belonging to the Local, which property, of about $750,000 in value, has been administered by International in trust for the Local.

In December, 1950 and January, 1951, a referendum of the members of Local No. 12, was "fairly and honestly conducted" by secret ballot mailed under supervision of Price, Waterhouse & Co., accountants, to determine whether autonomy was desired. The vote was 2,074 for autonomy, and 2,065 for continued supervision by International.

Prior to said referendum the General President of International had ordered the drafting of tentative by-laws by a convention called for that purpose, in preparation for the proposed autonomy of Local 12. A set of by-laws was then prepared, published in the official newspaper of Local 12 and distributed to the members. Officers were elected by the Local according to the by-law provisions, the principal officers being the same persons who had previously acted under appointment by the International Supervisor. As noted by the respondents, appellants made no effort to have these by-laws amended. As to the election of officers, appellants' attorney stated that "There is no challenge as to the mode of election".

The next step in the controversy was the institution by certain members of Local 12 of the Klippel case hereinbefore mentioned, as a representative action, seeking complete autonomy as to property and affairs of the Local. The judgment therein, which was against appellants' contentions, was held to be res judicata in the present action which, as stated, was dismissed by Judge Willis, resulting in the present appeal.

"The principal questions involved herein", according to appellants' brief are: "1. Is an estoppel, based on the principle of *res judicata,* applicable, where the prior judgment was not based on the merits but was based on the claim the members of a Local Union had not exhausted their remedies under the International Constitution? 2. May members of a Local Union appeal directly to the Courts where the International and the Local Union have violated their own basic Constitution? 3. May By-Laws be approved for a Local Union, which violate the basic Constitution, in method of adoption and also in contents?"

[1] Appellants' contention that the Klippel judgment was not res judicata for the reason that the decision of Judge Nourse in that case was "based wholly on the technical point that the court did not have jurisdiction over a dispute in a labor Union, where the parties have not exhausted all the remedies within the Union", rather than upon the merits of the controversy, is not persuasive. As said in respondents' brief, "The points raised by the appellants in this action were all made, argued and considered by the court in the Klippel case. * * * the court in the Klippel action was asked to set aside the by-laws for the very reasons assigned by the appellants herein. It is clear that the court in that case *could have ruled,* had the evidence justified it, *that autonomy was proposed to be restored under illegal by-laws and have enjoined further proceedings thereunder* * * *".

[2-4] "A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action", quoting from Olwell v. Hopkins, 28 Cal.2d 147, 152, 168 P.2d 972, 975. In Murdock v. Eddy, 38 Cal.App.2d 551, 554, 101 P.2d 722, 723, it is held that a judgment is res judicata in a later action even "when the point comes incidentally in question in relation to a different matter in the same or any other court". Answering another of appellants' contentions, the Murdock opinion further says: "It is also settled that when a party acts in a representative capacity, and as such is lawfully authorized to litigate the questions at issue for those whom he represents, they as well as he are bound by the judgment".

[5] Appellants' brief contains the statement that "It is important to note that none of the plaintiffs in *this* action was a plain-

tiff in the Klippel case", and from this premise argues that therefore the Klippel judgment could not be conclusive on the present plaintiffs. In this connection appellants cite Haese v. Heitzeg, 159 Cal. 569, 114 P. 816, wherein the court held that a different group of bondholders could press a different action notwithstanding previous litigation by other bond holders. However, as noted by respondents, this holding is not followed in the later case of Nelson v. Lake Hemet Water Co., 212 Cal. 94, 297 P. 914 where, in reference to a representative action, it was held, in the language of the headnote, that "All questions which could have been raised prior to such adjudication are conclusively deemed to have been presented, and all proof that could have been presented is conclusively presumed to have been received, and in a subsequent proceeding by certificate holders who were not parties to the previous proceeding in the Supreme Court, it is not germane to review the events transpiring prior to such adjudication".

In reference to representative actions it is said in 50 C.J.S., Judgments, § 777, p. 308: "Subject to some exceptions, qualifications, and limitations, it is a general rule as to class suits, that is, suits in which one or more persons sue or defend for all and the question is one of a common or general right or the parties are so numerous that it is impracticable to bring them all before the court, that the judgment will be binding on all persons belonging to the class so represented; and the rule has been held to apply to persons subsequently coming into the class". Nelson v. Lake Hemet Water Co., 212 Cal. 94, 297 P. 914, hereinbefore mentioned, among many other cases, is cited in support of the statement.

Appellants' contention that the Klippel judgment is not conclusive in the present action would, if here sanctioned, all but do away with the doctrine of res judicata itself. The record indicates that the judgment in the Klippel case was not a mere technical decision involving jurisdiction only, as appellants contend, but a final determination upon the merits of the case. The issues there involved were to all intents and purposes identical with those presented in the present litigation. To attempt to distinguish between the two cases would require finely spun distinctions without material differences entirely foreign to the spirit of res judicata doctrine. And, as said in respondents' brief, "The most vexatious results would attend any rule which permitted members of an organization to bring successive suits, purportedly on behalf of all members, with none being bound by the results except those named".

Appellants' other contentions are likewise without merit. Considerable space is given to the argument that the local union members may "appeal directly to the Courts (without exhausting remedies within the organization) where the International and Local Unions have violated their own basic Constitution". Another argument is that it would be futile for appellants to seek relief within the organization since the official group in power had declared against appellants' contentions. As stated in the respondents' brief, neither point has been established.

[6] Appellants' specific complaint is that the by-laws were illegal because not adopted at a "regular meeting", as required by Article XXII of the International Constitution, ballots being mailed to the members by Price, Waterhouse & Co., accountants. Respondents, however, point out that the Article above mentioned relates to autonomous local unions, whereas Local No. 12 was a supervised local administered under Article VI, Section 3 of the Constitution, all its affairs being under International control, and "all rights and powers of the Local Union to conduct its own affairs" being suspended.

[7] A further contention is that the by-laws are illegal because not adopted by "a majority of the members to whom ballots were sent". According to the stipulated facts, 10,306 ballots were mailed out; 2,118 voted ballots were returned, of which 1,714 were in favor of adopting the by-laws, and only 404 ballots were against adoption. As noted by respondents, Article XXIII, Section 12, page 100 of the International Constitution provides for a "majority vote", but does not require a "majority of the members" which appellants in-

sist upon. The election, as stated above, resulted in a 4 to 1 majority of those members voting. There was, of course, no way to compel all the members of the union to return the ballots. As commented upon in In re East Bay Municipal Utility Dist. Water Bonds, 196 Cal. 725, 239 P. 38, 46, the impracticability of appellants' interpretation of the constitutional requirement, is obvious. The East Bay case just mentioned held that "'a majority of the electors'" was satisfied by approval of those voting.

Neither in the record nor in the briefs filed is there presented any matter which would justify a reversal of the judgment herein. The trial court was fully justified, both on the law and the facts, in the judgment rendered.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

39 Cal.2d 698

HIRSCHMAN et al. v. LOS ANGELES COUNTY et al.

L. A. 22035.

Supreme Court of California, in Bank.
Nov. 14, 1952.

Proceedings by permanent civil service employees of County of Los Angeles to compel their reinstatement and payment of wages retroactive to date of discharge because of their refusal to execute oath and affidavits prescribed by orders of County Board of Supervisors. The Superior Court, Los Angeles County, W. Turney Fox, J., rendered a judgment adverse to the petitioners, and they appealed. The Supreme Court, 249 P.2d 287, affirmed the judgment and on petition for rehearing held that the term "officer" as used in section of Government Code requiring every officer to take constitutional oath before entering upon duties of his office includes both state and county officers but does not apply to all persons in public employment, and that section of Government Code specifically extending to all state employees the requirement that they take constitutional oath before entering upon their duties is not applicable to persons employed by a county.

Petition denied.

Carter, J., dissented.

1. Counties ⚷64
Officers ⚷36(1)
States ⚷48

The term "officer" as used in section of Government Code requiring every officer to take constitutional oath before entering upon duties of his office includes both state and county officers but does not apply to all persons in public employment. Government Code, §§ 1360 et seq., 1363(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Officer".

2. Counties ⚷64

Section of Government Code specifically extending to all state employees the requirement that they take constitutional oath before entering upon their duties is not applicable to persons employed by a county. Government Code, § 18150 et seq.

Margolis & McTernan, John T. McTernan, William B. Murrish, Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, and Nanette Dembitz, New York City, for appellants.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, Los Angeles, and Robert L. Trapp, Deputy County Counsel, Santa Maria, for respondents.

PER CURIAM.

[1] In their petition for rehearing plaintiffs, who are civil service employees of Los Angeles County, claim that the county oath should be invalidated on the ground that the field of loyalty oath requirements for all public employees had been fully occupied by section 1360 et seq. of the Government Code which provide that every *officer* shall take the constitutional oath before entering upon the duties of his office. The term "officer" as used therein clearly includes both state and county officers (see § 1363(b)), but the provisions requiring execution of the oath do not mention *employees* and cannot reasonably be read as applying to all persons in public employment. That the Legislature had no such intent was made clear by the enactment of Government Code section 18150 et seq. which specifically extend the oath requirement to all *state employees.* These latter sections would obviously have been unnecessary and meaningless if section 1360 et seq. were construed as petitioners urge.

There is nothing in Tolman v. Underhill, 39 Cal.2d 708, 249 P.2d 280, which is inconsistent with our interpretation of sections 1360–1363 of the Government Code, since the case does not hold that those provisions, standing alone, require all public employees to take the prescribed oath. The opinion proceeds on the theory that sections 1360–1363 and 18150 et seq. must be read together in order to cover all persons in *state* service, both officers and employees.

Nor is any different interpretation of sections 1360–1363 required by reason of our holding in Pockman v. Leonard, 39 Cal. 2d 676, 249 P.2d 267, that all persons in public employment are protected by the constitutional prohibition against the imposition of religious or political tests as a qualification for "any office or public trust." Our construction of the language of the prohibition as running in favor of all public employees does not constitute a holding that all such persons must execute the constitutional oath and obviously does not compel us to interpret the term "officer" in section 1360 as applying to all persons in public employment.

[2] Government Code section 18150 et seq. clearly have no application to persons employed by a county, and under Government Code sections 1360–1363 the only persons in county service who are required to take the constitutional oath are officers. The field of loyalty oath requirements for all persons in county service was not pre-empted by statute until the adoption of the Levering Act, Government Code, § 3100 et seq. which expressly requires all county employees to take the oath prescribed therein. See Bowen v. County of Los Angeles, 39 Cal.2d 714, 249 P.2d 285.

The petition for rehearing is denied.

CARTER, Justice (dissenting).

I agree with petitioners that the holdings in the so-called Loyalty Oath cases are inconsistent and irreconcilable, and it seems to me that the supplemental opinion this day filed does not clarify but adds to the confusion which is the inevitable result of an attempt to reach a certain conclusion without pursuing a course of logical reasoning.

Government Code, section 1360, sets forth an oath identical with that prescribed in section 3, Article XX of the Constitution. Section 1363 provides that the oath applies to "officers elected or appointed for any county". In Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267, it was held that the word "officers" in section 3 of the Constitution applied to "every state and *local* officer and *employee*" and that such persons could not be required to take any oath but that set forth in the Constitution or one substantially identical thereto. Petitioners argue that the word "officer" in section 1363(b) should be given a similar interpretation and that they, as county employees, were required to take the oath set forth in section 1360 and that, as in Tolman v. Underhill, 39 Cal.2d 708, 249 P.2d 280, the Legislature had pre-empted the field so as to invalidate the county oath. In the Tolman case, 39 Cal.2d 708, 712, 249 P.2d 280, the Court said that "Although the adoption of local rules supplementary to state law is proper under some circumstances, it is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute (citations)" and "As we have already seen, the Legislature has enacted a general and detailed scheme requiring all state employees to execute a prescribed oath relating to loyalty and faithful performance of duty, and it could not have intended that they must at the same time remain subject to any such additional loyalty oaths or declarations as the particular agency employing them might see fit to impose. *Multiplicity and duplication of oaths and declarations would not only reflect seriously upon the dignity of state employment but would make a travesty of the effort to secure loyal and suitable persons for government service.*"

This Court now, after holding in Pockman v. Leonard, supra, that the word "officers" in the Constitution applies to every state and local officer and employee, seeks to distinguish this case on the ground that section 1363(b) cannot "reasonably be read as applying to all persons in public employment. That the Legislature had no such intent was made clear by the enactment of Government Code section 18150 et seq., which specifically extend the oath requirement to all state employees". It is also said that Tolman v. Underhill, supra, is not inconsistent with the interpretation given sections 1360–1363 of the Government Code, "since the case does not hold that those provisions, standing alone, require all public employees to take the prescribed oath. The opinion proceeded on the theory that sections 1360–1363 and 18150 et seq. must be read together in order to cover all persons in state service, both officers and employees". It appears to me that the argument used here *is* inconsistent with the statement in Pockman v. Leonard. Why should the word "officers" be given a different interpretation in construing the Constitution from that given it in construing section 1360 et seq. of the Government Code? Article 4 of Title 1, Div. 4, ch. 2 of the Government Code is entitled "Oath of Office" (not "Oath of Office" for county *officers*) and Chapter 4, Title 2, Div. 5, pt. 1, is entitled "Oaths for *State* Employees". But the latter provision relates back to Article 4 for the "Method and manner of taking, subscribing, and filing oath: Nonmember of civil service" (see section 18152). Both section 1360 (which is said to apply to county officers only) and section 18150 provide that the affiant will faithfully discharge "the *office* of ———" to the best of his ability; yet one is said to relate to officers only and the other to employees and that one may not include the other.

As the majority of the Court said in Pockman v. Leonard, supra, "We are unable to find any place where a line can reasonably be drawn so as to place some positions within and others outside the constitutional prohibition, and, in our opinion, there is no justification for excluding *any public servants* from its protection. The prohibition should therefore be read as applying to every state and local officer and employee. This construction is in accord with the basic purpose of safeguarding the public and its servants by forbidding oaths and declarations regarding matters that bear no reasonable relationship to governmental service *and particularly those that involve political and religious beliefs.* Persons in the lower levels of government are just as much entitled to this protection as those in higher positions." The supplemental opinion states that Pockman v. Leonard, supra, holds that all persons in public employment are protected by the constitutional prohibition against "the imposition of religious or political tests as a qualification for 'any office or public trust' ". The oath there was specifically held not to constitute either a religious or political test. I am of the opinion that the holding in the Pockman case goes farther than the Court *now* decides that it went. It is my understanding that the word "officers" there was held to include *all* employees, but that the oath involved in that case did not substantially differ from the Constitutional oath. I am of the opinion now, as I was then, see dissent, Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267, that if there is no difference between the two, then the Levering Act is a nullity.

In the Tolman case it was held that the state Legislature had expressly provided that the Constitutional oath was required of every state employee and, "by a series of statutes, has enacted a general and comprehensive scheme relating to execution and filing of the oath by all such persons" and that "Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme". What was said in the Tolman case with respect to legislative pre-emption of the field is as applicable to county employees as it was to state employees and it is my opinion that they may be required to take only the constitutional oath which is set forth in section 1360 et seq. of the Government Code together with the method and manner of taking the same. There is no merit to the argument that the constitutional oath provision is not self-executing; the Legislature has provided that the oath there set forth shall be taken and the manner in which it is to be done in that Article of the Government Code (4) entitled "Oath of Office". Therefore, if the Legislature did not pre-empt the field by the last mentioned statutes, it certainly did not do so by the Levering Act. Furthermore, if the Legislature could not prescribe any other oath than that set forth in section 3 of Article XX of the Constitution, such restriction should apply to all other legislative bodies in the state, and thus render the oath here involved invalid.

I would therefore grant a rehearing in this and all companion cases.

39 Cal.2d 831

FIREMAN'S FUND INDEMNITY CO. v. STATE INDUSTRIAL ACC. COMMISSION et al.

S. F. 18615.

Supreme Court of California, in Bank.

Nov. 18, 1952.

Rehearing Denied Dec. 15, 1952.

Proceeding under the Workmen's Compensation Act. To annul award of Industrial Accident Commission holding insurance carriers jointly and severally liable for disability due to a stroke precipitated by repeated strains and tensions during last 65 days of claimant's employment, employer's insurance carrier during first part of the 65-day period which had ceased to be the carrier of the risk before claimant suffered the stroke applied for a writ of review. The Supreme Court, Spence, J., held that insurance carriers were jointly and severally liable so far as claimant was concerned, but that award should be apportioned between carriers on basis of the various factors leading to disability.

Award affirmed in part and the matter remanded with directions.

Edmonds and Schauer, JJ., dissented.

Prior opinion, see 241 P.2d 299.

1. Workmen's Compensation ⚷1535

Findings and conclusion of Industrial Accident Commission that employment during a 65-day period subjected employee to repeated physical and mental strains and tensions which became excessive in cumulative effect and precipitated a stroke and that resulting injury arose out of and was incurred in the course of employment and hence was compensable were supported by substantial evidence.

2. Workmen's Compensation ⚷1205

A stroke precipitated by excessive cumulative effect of repeated strains and tensions incident to employment during last 65 days of work was the result of one continuous, cumulative injury and application for compensation filed within one year after last exposure to the cumulative force which precipitated stroke was not barred by limitations. Labor Code, §§ 5405, 5411.

3. Workmen's Compensation ⚷1205

The time limited by statute for filing application for compensation runs from the date of "exposure", for the consequences of which compensation is claimed, and in the case of a continuous injury, quoted word can only mean the time of the last exposure. Labor Code, §§ 5405, 5411.

See publication Words and Phrases, for other judicial constructions and definitions of "Exposure".

4. Workmen's Compensation ⚷1065

Workmen's compensation insurance carrier is directly and primarily liable for payment of any compensation for which insured employer is liable. Insurance Code, §§ 11650, 11651.

5. Workmen's Compensation ⚷1277

Where claim for compensation for disability due to stroke precipitated by cumulative effect of repeated strains and tensions during last 65 days of employment was filed within one year after last exposure to such precipitating cause, claim was not barred by limitations as against insurance carrier of the risk during first part of 65-day period of exposure, though claim was filed more than one year after such insurer had ceased being carrier of the risk. Insurance Code, §§ 11650, 11651; Labor Code, §§ 5405, 5411.

6. Workmen's Compensation ⚷1074

Workmen's compensation carrier during first part of 65-day period of exposure to repeated strains and tensions, the cumulative effect of which precipitated stroke for which compensation was awarded, was jointly and severally liable for such compensation with carrier of the risk during last part of period of exposure so far as employee was concerned, but as between the insurance carriers, the award should be apportioned on the basis of the various factors leading to disability. Insurance Code, §§ 11650, 11651; Labor Code, §§ 5405, 5411, 5412.

◆

Keith, Creede & Sedgwick and Frank J. Creede, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. A. Groezinger, Leonard, Hanna & Brophy and Edmund D. Leonard, San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of an award of the Industrial Accident Commission holding petitioner jointly and severally liable with another insurance carrier for the disabilities suffered by an employee at a time when petitioner had ceased to be the insurance carrier.

Frank C. Gregory, aged 65 years, was employed as Port Manager by the Waterfront Employers' Association. On February 9, 1949, he suffered a cerebral vascular accident (stroke) which resulted in a partial paralysis of his right side. One day less than a year later, on February 8, 1950, he applied to the respondent commission for compensation. The evidence showed that for a period of 65 days, from December 5, 1948, to the date of the stroke, Gregory had worked 11 hours per day in an atmosphere of strain and tension attempting to conclude contract negotiations with certain labor unions. The medical testimony, although disputed, showed that the long hours of work, coupled with the tense and trying conditions which surrounded them, could aggravate an existing hypertension which in turn could, and here did, precipitate a cerebral vascular accident

[1] From the above evidence the commission found that Gregory's employment during the period from December 5, 1948, to February 9, 1949, "subjected applicant to repeated physical and mental strains and tensions which said strains and tensions became excessive in cumulative effect and precipitated [a] cerebral vascular accident on February 9, 1949." It then held that the injury arose out of and was incurred in the course of the employment. The findings and holding of the commission are supported by substantial evidence and there is therefore no question as to the compensability of Gregory's condition.

During the major part of the 65-day period leading up to the stroke, until January 25, 1949, the petitioner, Fireman's Fund Indemnity Company, was the employer's insurance carrier. On that date the employer changed carriers and substituted the Industrial Indemnity Company. The commission made an award against the two carriers jointly and severally.

Petitioner contends that since it ceased to insure the employer on January 25, 1949, and Gregory did not suffer his stroke until approximately 15 days later, February 9, 1949, it was not the carrier of the risk at the time of the injury and is therefore not liable. It further contends that if there was an injury on or before January 25, 1949, which resulted in the stroke on February 9, 1949, its liability therefor cannot be enforced because no proceeding was commenced for the collection of benefits until February 8, 1950, more than one year after the date petitioner ceased being the carrier of the risk. Labor Code § 5405. These contentions are untenable.

No contention is made by respondents that the situation here constitutes an "occupational disease" within the meaning of Sections 5411 and 5412 of the Labor Code. However, they do contend, as does the Industrial Indemnity Company, that the stroke resulted from but one single and continuous injury which occurred over a 65-day period, and that the statute of limitations runs from the last date of suffering such injury. Section 5405 of the Labor Code fixes the period within which proceedings may be commenced as one year from "the date of injury," which, according to Section 5411, except in cases of occupational disease, "is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed."

The problem of this case is thus twofold. First, it must be determined whether the disability was the result of one continuous injury or whether there was a series of individual injuries. Second, assuming that there was but one continuous injury, it must be determined whether a carrier who ceased being the insurer more than a year prior to the filing of the claim may successfully plead the statute of limitations.

In Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm., 29 Cal.2d 492, at page 496, 175 P.2d 823, at page 826, this court stated: "Where an employee suffers a heart attack brought on by strain and overexertion incident to his employment the injury or death is compensable, even though the idiopathic condition previously existed, and no traumatic injury is necessary. [Citing cases.]" It was then held in 29 Cal.2d at page 498, 175 P.2d at page 827: "* * * [T]he evidence does show that the accumulated effects of the overwork ultimately culminated in the disability that manifested itself on February 8, 1945. The injury, the overwork, was developing the disease all during the period of his employment, and February 7, 1945, was the last day of that process which without further work or activity in the employment became disabling the following day."

[2] We may accept these statements as authority for the conclusion that in the development of a stroke some point exists where without further strain and tension resulting from the employment, the stroke will result This point is reached through the cumulative effect of each day's strain and tension. Separately one day's strain may be slight, but when added to the strains which have preceded, it becomes a destructive force. Consequently, in deciding the responsibility for the stroke, it cannot be said that any one particular exposure to strain and tension was responsible. It can only be said that the total exposures resulted in the disability. Therefore, it must be concluded that the stroke here was the result of one continuous, cumulative injury rather than a series of individual injuries.

[3] If the strain and tension to which Gregory was subjected constituted one continuous injury, the statute of limitations did not begin to run until the last exposure to the causative force. The Legislature has laid down the rule that the limitations period is to run from the time of the exposure. Labor Code § 5411. In the case of a continuous injury this can only mean the time of the last exposure. To require the employee to file his claim within a limited time from the first exposure would be unreasonable. After a single exposure the employee might be totally unable to notice that a deleterious effect has taken place. Only after extended exposure may the effects become noticeable. Consequently, it should only be after the exposures constituting the continuous injury have been concluded that the period of the statute of limitations commences to run. For a summary of the case law in this general field see Annotation, 11 A.L.R.2d 279.

Gregory filed his claim within the one-year statutory period of limitations, Labor Code §§ 5405, 5411, from the cessation of the exposures, and his employer is therefore liable for the full extent of the disabilities. The respondent commission held the employer's insurance carriers jointly and severally liable, but petitioner argues that since more than one year had expired since it ceased being the carrier of the risk, its liability is barred by the statute of limitations.

[4, 5] It is the settled law of this state that the insurance carrier is directly and primarily liable for the payment of any compensation for which the employer is liable. Insurance Code § 11651; United States F. & Guaranty Co. v. Industrial Accident Comm., 195 Cal. 577, 234 P. 369. Thus it has been held that where the employer waived the statute of limitations, the insurance carrier is likewise deemed to have waived it, and its liability continues to be coextensive with the employer's liability. United States F. & Guaranty Co. v. Industrial Accident Comm., supra, 195 Cal. 577, 580, 234 P. 369. It is apparent therefore that we look to the employer to see whether the statutory period has run. In the case of a continuing injury the period of limitation commences to run from the time the exposures have ended, and not from the time the employer and his insurance carrier terminate their relationship. The policy and language of Sections 11650 and 11651 of the Insurance Code clearly indicate that the rights of the employee cannot be affected by the activities of the employer and his insurance carrier. While here Gregory is fully protected because of his award against the Industrial Indemnity Company, situations may arise where such protection would not exist. We must therefore hold that consistent with the policy and language of the cited code sections, the insurance carrier is liable if the employer is liable.

[6] The commission found petitioner jointly and severally liable with the other insurance carrier. This finding is correct so far as the employee is concerned, since he should not be required to fix the precise portion of the disability attributable to each period of exposure. However, as between the two insurance carriers of the single employer who employed the injured employee during the entire period of exposure, we are of the opinion that a proper apportionment of the award, based on the various factors leading to the disability, should be made in a separate proceeding in a manner similar to that prescribed for apportioning an award as between successive carriers or employers in cases involving occupational diseases. Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 86, 172 P.2d 884.

The award is affirmed so far as the employee is concerned, and the matter is remanded to the respondent commission with directions to make a proper apportionment of the award between the insurance carriers.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concur.

EDMONDS, Justice (dissenting).

I am in accord with the conclusions that the stroke was not the result of a series of individual injuries, the statute of limitations did not begin to run until the last exposure, and Gregory filed his claim within the statutory period. However, I do not agree that the stroke was the result of one continuous, cumulative injury nor do I believe that any apportionment of liability can be made as to Fireman's Fund, which was not the insurance carrier on the date of injury.

As I understand the contentions made by Fireman's Fund, it argues that either the employer's, and thus its own, liability is barred by the statute of limitations, or, if the statute is not a bar, the date of injury must be held to be after its period of coverage had terminated. The majority have given consideration only to the first of these alternative propositions. I also believe that they have failed to consider a third possibility for establishing the date of injury when they state that "it must be determined whether the disability was the result of one continuous injury or whether there was a series of individual injuries". In my opinion, the disability was the result solely of the final exposure, without which it would not have occurred.

I agree with the majority that the quoted statements from Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm., 29 Cal.2d 492, 498, 175 P.2d 823, are "authority for the conclusion that in the development of a stroke some point exists where without further strain and tension resulting from the employment, the stroke will result. * * * Separately one day's strain may be slight, but when added to the strains which have preceded, it becomes a destructive force".

However, I cannot follow the complete reversal of position which occurs in the following sentence. If one day's strain may become a destructive force, then, in my opinion, it can be said that that particular exposure to strain and tension was responsible. Rather than constituting a holding that the date of injury includes all dates during the exposure, the Lumbermen's case amounts to a declaration that the date of injury is the date upon which the accumulated effects of exposure, without further activity, culminate in a condition which thereafter becomes disabling. The rule laid down by that decision meets the test of logic. If the disability is the result of a cumulative condition, then, presumably, had the employee left his employment or otherwise been freed from exposure prior to the date upon which the condition culminated, the disability would not have occurred. Therefore, under the rule of the Lumbermen's case, the date of injury here was February 9, 1949, the last date of exposure. Fireman's Fund was not the insurance carrier on that date, and cannot be liable for the injury. It need not invoke the statute of limitations as a defense.

True, "the insurance carrier is directly and primarily liable for the payment of any compensation for which the employer is liable". But, obviously, an insurance company cannot be made to pay claims upon an employer whom it does not insure. Here, the employer incurred no liability until the date of injury, long after he had terminated his relationship with Fireman's Fund.

The basic error in the majority opinion lies in analogizing the present situation to that existing where an occupational disease is the basis for the claim. In so doing, the majority ignore the distinction required by the statute. Only in the case of an occupational disease does the date of disability determine the date of injury. That could result at a time remote from the date on which the incident or exposure leading to disability occured. Therefore, in accordance with the objectives of the statute and to protect the employee, this court developed the doctrine of apportioning an award as between successive carriers or employers in cases involving occupational diseases. Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 172 P.2d 884.

However, in all other cases, the date of injury is the date on which the incident or exposure leading to disability occurred. Of necessity, that date will be during one particular employment and the insurance coverage, if any, will be such as existed on that date. There is no necessity for apportionment in order to protect the employee.

The rule laid down by the majority will have far-reaching consequences and, inevitably, lead to absurd results. For example, suppose an employee had been overworked for sixty days by his employer and then changed his employment. In his new occupation, he did not overwork but for five more days he devoted late hours to his personal affairs. This, added to the previous strain of overwork, resulted in his stroke. Obviously, the second employer would not be liable for his injury. But, under the new rule here laid down, the first employer would have to pay almost total disability, despite the fact that the stroke was not the result of the employment and the beneficiary was no longer its employee.

This inequitable result is inherent in treating a stroke in the same way as if it were an occupational disease. It cannot be so classified because it is a disease common to all callings. For this reason, it causes will be different in each individual case. To attempt to trace the combination of strains and circumstances which eventually lead to a stroke is virtually impossible. One man, such as Gregory, may suffer the disease from overwork; another from the tension of normal duties; and still a third from over-exertion on the golf course. Or one individual may have a stroke as the result of a combination of all of these strains plus more. To hold that each employer responsible for some one of these particular tensions over the entire adult life of the individual is to fix liability on the basis of speculation. It would be impossible to defend claims which may be stale by many years or even decades. Yet this is exactly what employers will find themselves faced with in the future.

For these reasons, I would annul the award insofar as it holds Fireman's Fund liable for the disabilities suffered by Gregory.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Justice EDMONDS and, generally, in the grounds stated therefor.

Unless the stroke is to be regarded as an occupational disease caused by a cumulative injury (and it is conceded that it is not such) I think apportionment of liability either among successive employers or (as is the case here) among successive insurance carriers of a single employer is untenable, and that attempted application of the rule in other cases may prove impracticable and unjust.

I would, therefore, annul the award insofar as it holds Fireman's Fund liable for disabilities suffered by Gregory.

Rehearing denied; EDMONDS and SCHAUER, JJ., dissenting.

114 Cal.App.2d 237

JONES v. LINDSEY.

Civ. 19158.

District Court of Appeal, Second District,
Division 2, California.

Nov. 17, 1952.

Claim and delivery action to recover certain machines and electric motors in defendant's possession. A default judgment for defendant was entered. On plaintiff's motion to vacate the judgment, the Superior Court, Los Angeles County, Ellsworth Meyer, J., vacated the judgment and defendant appealed. The District Court of Appeal, Moore, P. J., held that where neither the plaintiff nor his counsel received notice of trial setting date procured by defendant's counsel, the trial court did not abuse its discretion in vacating the judgment.

Affirmed.

1. Appeal and Error 🔑957(1)
Judgment 🔑139

Motion to vacate a default judgment is addressed to sound discretion of the trial court and its action will not be upset on appeal in absence of clear showing of abuse of such discretion. Code Civ.Proc. § 473.

2. Judgment 🔑138(3)

Where defendant sent notice to plaintiff's counsel of trial setting date but notice was mailed to an address long vacated by plaintiff's counsel and was never received by him and plaintiff did not have notice of trial, action of trial court in vacating default judgment was not an abuse of discretion. Code Civ.Proc. § 473.

3. Appeal and Error 🔑1024(4)

Where there is any conflict in averments of affidavits on motion to vacate default judgment, the action of trial court is conclusive and will not be disturbed on appeal. Code Civ.Proc. § 473.

4. Judgment 🔑138(3)

The lack of diligence and absence of zeal on part of plaintiff in his failure to pursue his cause of action to judgment did not preclude setting aside of default judgment against plaintiff where neither plaintiff nor his counsel had received notice of trial setting date procured by defendant. Code Civ.Proc. § 473.

5. Judgment 🔑136

Statute authorizing court to relieve party from defaults taken against him through his mistake, inadvertence, surprise or excusable neglect is liberally construed so as to dispose of cases on their merits. Code Civ.Proc., § 473.

◆

Jack R. Mills, Los Angeles, for appellant.

Anderson, McPharlin & Conners, Los Angeles, by Kenneth E. Lewis, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from an order entered pursuant to Code of Civil Procedure, section 473, vacating a judgment in his favor.

Respondent commenced this claim and delivery action on March 19, 1948, to recover certain Baby Do-nut machines and electric motors then in defendant's possession. Bond was posted in the sum of $4,000 whereupon respondent took immediate possession of the property and removed it to a warehouse for storage. For plaintiff's failure to pay the storage charges, however, the property was sold by the warehouseman. The cause was originally set for trial on March 16, 1949, but was allowed to go off calendar and was not again set for trial until defendant procured a setting upon the short cause calendar for February 26, 1951, at which time plaintiff did not appear. Judgment for the defendant was entered on September 24, 1951.

In support of his motion to vacate the judgment, plaintiff filed an affidavit stating that the default was entered without his knowledge; that his last information as to "any activity in the within action was on or about March 18, 1949"; that thereafter he "believed that his interests in connection with the within action were being taken care of by affiant's attorney of record * * * Arthur Wright, Jr."

Mr. Wright's affidavit, also filed on behalf of plaintiff, related that affiant had never received notice of the trial setting date procured by defendant's counsel. Such affidavit also declared that Wright had changed his office location twice since the initial filing of the action and at the time the notice of trial was allegedly sent him at his former Los Angeles location he was practicing in Oakland.

[1-3] The court's action in vacating the judgment was proper under the facts adopted. A motion pursuant to section 473, Code of Civil Procedure, is addressed to the sound discretion of the trial court. Its action will not be upset on appeal in the absence of a clear showing of an abuse of such discretion. Beard v. Beard, 16 Cal.2d 645, 647, 107 P.2d 385. The fact that plaintiff and his counsel did not have notice of the trial is sufficient basis for the trial court's ruling. See Tearney v. Riddle, 64 Cal.App.2d 783, 787, 149 P.2d 387; Potts v. Whitson, 52 Cal.App.2d 199, 208, 125 P.2d 947; Buell v. Emerich, 85 Cal. 116, 118, 24 P. 644. Although the record reveals that defendant sent such notice to plaintiff's counsel, it was mailed to an address long vacated by Wright and according to the latter's affidavit, it was never received by him. Where there is any conflict in the averments of the affidavits, the action of the court below is conclusive and will not be disturbed on appeal. Hadges v. Kouris, 71 Cal.App.2d 213, 217, 162 P.2d 476.

Moreover, prior to the date defendant secured his judgment, defendant's counsel had notice of Wright's address at Oakland by virtue of Wright's having filed on February 14 with the court, and forwarded by mail to defendant's attorney, an application for an order releasing Wright as attorney for the plaintiff. With such communication before defendant's counsel and without further word from plaintiff as to the forthcoming trial—then only a few days hence—defendant might well have concluded that plaintiff's failure to appear for trial was not willful.

[4, 5] Admittedly, the record reveals a lack of diligence and an absence of zeal on the part of plaintiff in his failure to pursue his cause of action to judgment. However, such fact does not compel this court to conclude that the trial judge was by reason thereof guilty of an abuse of discretion, in view of plaintiff's verified explanation. The law favors the adjudication of actions on the merits and to that end relief from defaults through a liberal construction of section 473 is encouraged. Friedrich v. Roland, 95 Cal.App.2d 543, 552, 213 P.2d 423.

The order is affirmed.

McCOMB and FOX, JJ., concur.

114 Cal.App.2d 220

WALLACE v. SINCLAIR.

Civ. 18746.

District Court of Appeal, Second District,
Division 2, California.

Nov. 17, 1952.

Hearing Denied Jan. 15, 1953.

Suit by limited partner against general partner for dissolution of partnership. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment in favor of limited partner, and the general partner appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that general partner had not conducted partnership business with reasonable diligence and good judgment, and that under the condition which existed between the partners, the business could not be carried on for their mutual benefit.

Judgment affirmed.

1. Partnership 🔑376

Limited partner was entitled to dissolution on proof that business could be carried on only at loss which would greatly diminish and further destroy his share of partnership assets, notwithstanding that limited partner had received generous returns on his investment in years previous.

2. Partnership 🔑376

In action by limited partner against general partner for dissolution of partnership, evidence sustained finding that general partner had not conducted partnership business with reasonable diligence and good judgment and that under conditions which existed between the partners business could not be carried on for their mutual benefit.

3. Appeal and Error 🔑989, 996

After the reviewing court has reached a determination that evidence favorable to findings is substantial, its investigation of adequacy of such proof is at an end, and it cannot substitute its deductions for inferences reasonably drawn by trial court.

4. Appeal and Error 🔑931(1)

On appeal, all reasonable inferences must be viewed in the light of the findings made by the trier of fact.

5. Partnership 🔑315

Where bitter and antagonistic feeling between partners has developed to point where partners cannot continue partnership to their mutual advantage, and both give notice terminating partnership, a dissolution thereof is the equitable solution and should be decreed. Corporations Code, § 15032 (c–f).

6. Partnership 🔑314

Code provision relating to situations in which the court shall decree a dissolution of a partnership is a mandatory direction to the chancellor. Corporations Code, § 15032(c–f).

7. Partnership 🔑376

Where partnership suffered successive losses and showed no prospect for improvement as operated by general partner, and where general partner, after limited partner demanded dissolution, served notice of dissolution on limited partner and on interested agencies, attempted to coerce limited partner to sell his interest, and refused limited partner profit and loss statements, a decree of dissolution was required. Corporations Code, § 15032(c–f).

8. Statutes 🔑223.2(17)

Where word "agent", as used in provision of Alcoholic Beverage Control Act making it crime for agent of liquor wholesaler to own any interest in business of an on-sale licensee, was not defined therein or in constitutional liquor licensing provision other statutes would be consulted to ascertain the significance of such word. Civ.Code, §§ 2315–2320, 2330; Gen.Laws, Act 3796, §§ 54, 54.5, 54.6; Const. art. 20, § 22.

9. Principal and Agent 🔑1

"Agency" is the relation that results from the act of a person called a principal who authorizes another called the agent to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal.

See publication Words and Phrases, for other judicial constructions and definitions of "Agency".

10. Principal and Agent 🔑26, 92(1), 99

The extent of an agency is measured by the authority conferred upon the agent, actually or ostensibly, and his power is sufficient to do everything that is necessary, proper or usual to accomplish the purpose of the principal, and the agent has actual authority as defined by the Civil Code, unless limited by the principal, and his ostensible authority is unlimited except as to those persons having knowledge of the restrictions imposed upon the agency. Civ. Code, §§ 2315–2320, 2330; 2316, 2318.

11. Appeal and Error 🔑1008(1)

In action by limited partner against general partner for dissolution of partnership which operated as on-sale liquor licensee, where general partner interposed defense of unclean hands on ground that limited partner was agent of liquor wholesaler and was thus violating Alcoholic Beverage Control Act, finding by trial court, which properly received testimony relating to the matter, that limited partner was not such an agent, was not arbitrary and was binding upon reviewing court. Gen.Laws, Act 3796, § 54.

12. Evidence 🔑459(2)

Where the extent of an employee's authority is not clearly defined by a writing or when such writing is ambiguous, testimony will be received for purposes of deriving a determination as to whether employee was servant or agent.

13. Principal and Agent ⚷3(1)

Fact that an employee was referred to as the "assistant sales manager" was not determinative of his actual status as employee or servant.

14. Partnership ⚷376

Fact that limited partner, in partnership which was suffering losses without prospect of later recovery, had received dividends in an amount three times that of his investment in the five years before partnership began to lose, had offered to sell his interest to general partner for $75,000, and had demanded dissolution when assets were worth $193,000, did not make such demand inequitable and subject to dismissal.

15. Partnership ⚷315

Under Civil Code provision for dissolution of partnership, a partner may insist upon a dissolution if the partnership will continue to operate only at a loss. Corporations Code, § 15032.

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James L. Patten and J. A. Leetham, Los Angeles, for appellant.

Clock, Waestman & Clock, by Henry H. Clock, Long Beach, for respondent.

MOORE, Presiding Justice.

Defendant appeals from a judgment dissolving a limited partnership and decreeing that its assets be sold and distributed in equal shares to the partners after payment of partnership liabilities and expenses of sale.

By written articles on December 28, 1943, the parties agreed to engage in the partnership for the purpose of buying and selling alcoholic beverages, catering and sale of food and meals to the general public and the purchase and lease of real and personal property. Commencing January 1, 1944, the partnership operated ten stores and cafes in the southern portion of Los Angeles county. The enterprise proceeded profitably and agreeably until the middle of 1949. Thereafter it continuously lost money. The volume of sales in their stores, saloons and cafes greatly decreased and the volume of partnership business dropped substantially. As a result of the decline in sales volume, the partnership operated at a loss and its capital assets became reduced. Despite the decline in volume of business and profits and the reduction of partnership assets, appellant as general partner continued to draw his $750 per month salary and maintained approximately the same percentage of general expense in its ratio to net sales. As a result of such policy, the partnership operated at a loss after the middle of 1949.

On respondent's demand for a termination and dissolution of the partnership and determination and liquidation of the assets, appellant refused compliance, took the position that he was the injured man and resolved upon terminating the partnership. In response to a supplemental complaint, the court found that after the filing of the original complaint, appellant carried on a course of conduct in violation of the partnership agreement and conducted himself in violation of certain provisions of section 15032 of the Corporations Code, hereinafter quoted, in this, to wit: defendant served on plaintiff a purported notice of dissolution based upon a violation of section 54 of the A. B. C. Act[1]; gave notice to the Board of Equalization that the partnership had been terminated and that respondent was no longer interested in its affairs; notified other agencies that respondent was no longer a member of the firm; attempted to coerce respondent to sell his partnership interest to appellant on the basis of the cost value and refused to give respondent a statement of profit and loss. From which the court concluded that as a result thereof appellant breached the partnership agreement and it is not reasonably practicable for the partnership to be carried on by the parties.

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[1] A. B. C. refers to the Alcoholic Beverage Control Act, Statutes 1935, p. 1123, and subsequent amendments to 1949, Gen. Laws, Act 3796. Section 54 of the Act makes it a crime for a wholesaler or his agent to own any interest in the business of an on-sale licensee.

About 1941 appellant established a business with Carl Wallace, brother of respondent, which was a limited partnership. When the matter was presented to the liquor control officer, it was determined that since Carl was vice president of a wholesale liquor corporation, his partnership with appellant was a violation of section 54 of the A. B. C. Act which makes it unlawful for an officer of a wholesale liquor company to own an interest in a retail liquor business. Pursuant to such decision, Carl's interest was sold and transferred to respondent who was an employee of Carl's corporation, to wit: Home Ice and Cold Storage Company, herein referred to as Home Ice. With such interest appraised at $54,480.53, the new limited partnership commenced operations with a capital of substantially $109,000 with appellant as a general partner and respondent as the limited partner. Each was to share equally in the profits and losses, but appellant was to have sole charge and reasonable compensation therefor. Respondent was to have no part in the management. While the agreement provided for termination of the partnership January 1, 1959, unless terminated by dissolution at an earlier date, it provided also: (1) the partnership should become dissolved on the happening of any event which is specified by law as a cause of dissolution of a general partnership; (2) if dissolution should be caused by the misconduct of a partner, then at anytime before the business be completely wound up, the innocent partner may purchase the other's interest after notice to the offending partner on the basis of a formula set out in the agreement; (3) upon the giving of such notice by the innocent partner, he shall be deemed to have become the purchaser and owner of the retired partner's interests in the partnership assets; (4) thereupon he shall be entitled to possession of such assets and good will of the partnership, free of any claim on the part of the retired partner except to receive the purchase price.

Prior to the commencement of the instant action the parties conducted some negotiations for a settlement. Respondent complained of the way the business was going and insisted that appellant sell the units that were losing money. In March, 1950, respondent made appellant a written offer to sell his share for $75,000 or to buy appellant's share for the same price. Such offer was rejected along with appellant's offer to pay respondent the book value ($60,000) of the latter's interest or to sell his own share to respondent for $85,000. Following a rejection of appellant's offer, respondent filed suit.

Evidence Sufficient.

As grounds for reversal, appellant contends first that the evidence is insufficient to justify a dissolution of the partnership. Appellant testified to the net loss of $3,268.40 in 1949, $3,672.60 in 1950. Appellant's accountant, Mr. Leach, testified the business operations for 1949 suffered a loss of $6,849.03 which was cured to some extent by two long term capital gains aggregating $3,580.63; the operating loss for the first eleven months of 1950 was $11,372, while a gross profit was earned in December in the sum of $1,659.81 from which appellant's salary of $750 was deductible. Appellant testified that for the five months following November, 1950 the business operated at a loss. Respondent testified that the costs of operations caused a loss because of changed conditions; the firm had not kept up with its competitors in respect to attractions or display advertisements, and retained no competent salesmen who could make suggestions of other items as is done by competitors.

From Mr. Leach's testimony, the net worth of the partnership at the end of six specified years was as follows:

1945	$156,000
1946	148,000
1947	139,000
1948	142,000
1949	122,000
1950	119,000

From that proof the inference is unavoidable that the assets of the partnership declined 23 per cent in five years; over 16 per cent in the two years preceding January 1, 1950, and the net value of the business reached the nadir of its career by April 30, 1951. What more is required to demonstrate the truth of the finding that the business can be operated only at a loss with its present constituent units, its same salesmen and with the manager that directed it during those five fateful years? Should deterioration continue at the same speed, nothing but the corpses of the participants could be found at the close of the period fixed by the partnership agreement.

The courses of some of the units taken separately are calculated, and they justify the implied finding that appellant's genius for management is not likely to restore harmony or to increase the chances for material gain. In September, 1949, the Blue Door (liquor store, bar and cafe) made a profit of $337.40, and for October it made $135.34. Thereafter it lost each month until April 1, 1950, aggregating a loss of $1,903.07. For eight months in 1949 the Blue Door suffered a net loss of $1,100 and for 11 months in 1950, $900. While the liquor store made a profit throughout 1949 and in ten months of 1950, the *cafe and bar* lost every month in 1949 except September and in every month of 1950 except August and November. The cafe and bar lost every month in 1949, except September and all of 1950 except September and October. While appellant testified that the operating loss of the Blue Door was caused by the closing of the Anaheim street bridge, the proof shows that the Blue Door as a whole suffered a net loss for six months prior to the closing of the bridge. In the cases of the Rancho Liquor Store, the Schulyer Bar and the Club Cafe, appellant gave plausible excuses for the diminution of receipts. It was either roadwork on the highway, disappearance of military activity, lack of "general business" or price competition. The glaring fact established as to the four mentioned units is that they were steadily losing money. Appellant testified that the Club Cafe and Bar operated at a loss for a year and a half and that such trend continued from October 18, 1950, to the time of trial, May 24, 1951.

[1] During the first five years of the partnership, each partner received as his share of the profits in excess of $37,000. No revenues were available after September, 1949. By reason of the generous returns on respondent's investment, appellant contends that respondent has no right to complain of the dearth of gain; that the latter had earned sufficient; that he should be happy to be quiet for a while until the business potential can be captured and payment of dividends can be resumed. It is not within the right of appellant to direct the course to be pursued by respondent. The latter received his share of the earnings during prosperous years. Under the agreement he was entitled to them. They became a part of his own reserves. He is as much entitled to a dissolution of the partnership now on proof that "the business * * * can only be carried on at a loss and further continuance will greatly diminish and further destroy his share of the partnership assets" as he would have been at the close of the first year without having received any dividend on his investment.

That the court was warranted in making the finding last quoted is further evidenced by the ratio of the operating profit to net sales, as testified by Mr. Leach. In 1945 it was 18.67 per cent; in 1946 it was 10.72 per cent; in 1947 it was 2.6 per cent; in 1948 it was 4.8 per cent; in 1949 it was minus .88 per cent; in 1950 it was minus 2.97 per cent. The relation of the operating expense to the operating receipts[2] shows that in 1945 the operating expense

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[2] **Gross receipts, expenses including the $9,000 salary and percent of gross income for operating expenses.**

1945	$661,000	$45,000	6.8
1946	469,000	31,000	6.6
1947	392,000	31,125.11	7.9
1948	420,000	25,750	5.9
1949	371,000	21,750	5.7
1950	310,000	18,600	5.8

was 6.8 per cent of the gross receipts; in 1946, 6.6 per cent; in 1947, 7.9 per cent; in 1948, 5.9 per cent; in 1949, 5.7 per cent, and in eleven months of 1950, 5.8 per cent.

The effect of the proof of the practices of appellant as operator of the partnership business on the trial judge appears to have been aggravated by appellant's ignorance of details. He did not know whether the cost of maintenance of the burglar alarm exceeded the cost of insurance; whether a resume of the cost of operations was correct; whether the figures testified to by Mr. Leach included the overhead charge at the Bank Cafe. Neither did he know the value of the realty or of the liquor licenses owned by the firm, the proximate amount invested in the Schuyler Cafe or the sum of its original investment or how long it had been unprofitable. Nor did he know the value of an on-sale or an off-sale license. Coupled with the view of the toboggan slide of the business during the past three years preceding the commencement of the action, such ignorance and lack of interest on the part of the general manager must have convinced the court that the business would probably continue to be operated at a loss.

Appellant argues that the only evidence on the question whether the business could only be carried on at a loss was his own testimony and that was that "all units are operating at a profit with the exception of two." However, the profit and loss statements received in evidence show that only three made profit while seven suffered a loss.

[2–4] Notwithstanding the contradictory evidence received on behalf of appellant, the foregoing discloses the presence in the record of substantial proof in support of the findings. After the reviewing court has reached the determination that the evidence favorable to the findings is substantial, its investigation of the adequacy of such proof is at an end and it cannot substitute its deductions for the inferences reasonably drawn by the trial court. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Southern California Iron & Steel v. Amalgamated Association of Iron and Steel, 186 Cal. 604, 618, 200 P. 1; All reasonable inferences must be viewed in the light of the findings. Tyson v. Romey, 88 Cal.App.2d 752, 755, 199 P.2d 721.

In addition to the finding that appellant has not conducted the partnership business with reasonable diligence and good judgment, the court determined also that appellant's service of a notice of dissolution on respondent, his similar notices to other agencies, his attempt to coerce respondent to sell his interest to appellant, and his refusal to furnish respondent with profit and loss statements warrant the conclusion that the "partnership business and affairs can only be successfully carried on in an atmosphere of co-operation and harmony, and under the existing conditions, said business cannot be carried on for the mutual benefit of the partners." Such findings were based upon admissions of appellant despite his claim that he terminated the partnership by reason of the acts of respondent who "made it impossible for the partnership business to be successfully carried on in an atmosphere of harmony." Such admissions were supplemented by appellant's testimony in respect to each admission. By virtue of the last mentioned findings and the doctrine of the limitations upon the power of a reviewing court to disturb a finding based upon substantial evidence, the misconduct of appellant was established.

[5–7] Where bitter and antagonistic feeling between partners has developed to the point that the partners cannot continue the partnership to their mutual advantage and both give notice terminating the partnership, a dissolution thereof is the equitable solution of an ugly situation and should be decreed. Owen v. Cohen, 19 Cal.2d 147, 152, 119 P.2d 713; Corp.Code, sec. 15032 (c, d, e, f.) The cited code section is a mandatory direction to the chancellor. The "court shall decree a dissolution whenever: * * * (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business, (d) or * * * so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him, (e) The business of the partnership can only be carried on at a loss, (f) Other circumstances render a dissolution equitable." By virtue of the statute and the facts found, the denial of a dissolution would have been a denial of justice.

Was Respondent an Agent of Home Ice?

[8] Appellant has met the arguments adduced in favor of the judgment with rare cunning, but also he has carried the war into Africa and demands a reversal by reason of his thesis that respondent was at all times the agent of a liquor wholesaler in violation of section 54 of the A. B. C. Act. One finding in substance is that while respondent has held the title of manager of the Beverage Department and manager of the Long Beach plant, he has never been an agent, officer or director of that corporation at any time since the partnership began. Another finding is that the sales manager or manager of the liquor department of Home Ice is not an officer or agent within the meaning of section 54 of the A. B. C. Act. Appellant insists that there is no evidence to support such findings. He argues that (1) while respondent had his interest in the retail partnership he became an agent of Home Ice; (2) because of such simultaneous agency and ownership, respondent is at fault, his hands are unclean and he has no standing in equity. A listing of the evidence on both sides of such issue and all the statutes and decisions cited in support of both contentions would avail nothing. The court made the cited findings on that issue and substantial proof was presented upon the question as to whether the facts establish respondent to have been an agent of Home Ice. While the word "agent" is used in section 54 it is not defined there or in section 22 of Article XX of the Constitution which makes provision for the licensing and regulating of the manufacture, sale and possession of intoxicating liquor. It is therefore necessary to consult statutes other than 54, 54.5 and 54.6 to ascertain the significance of "agent."

[9–13] Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. The heart of agency is expressed in the ancient maxim: *"Qui facit per alium facit per se."* See 2 C.J.S., Agency, § 1, p. 1023. The extent of the agency is measured by the authority conferred upon the agent, actually or ostensibly and his power is sufficient to do everything that is necessary, proper or usual to accomplish the purpose of the principal. Civil Code, secs. 2315, 2316, 2317, 2318, 2319, 2320, 2330. The agent has actual authority defined by section 2316 unless limited by the principal, and his ostensible authority is unlimited except as to those persons having knowledge of the restrictions imposed upon the agency, sec. 2318. In brief, an agent can act in the place of his principal while an employee may act only for his employer. 2 Cal.Jur.2d p. 653; People v. Treadwell, 69 Cal. 226, 236, 10 P. 502; Crossin v. Elysian Springs Water Company, 105 Cal.App. 449, 454, 287 P. 985. In the light of such authorities, respondent was an employee, not an agent of Home Ice. He had none of the authority of a general manager of that corporation. See 6A Cal.Jur., p. 1156, sec. 656. Since an agent's employment is primarily to effect a business relationship between his principal and another, 2 C.J.S., Agency, § 1, subd. c and inasmuch as respondent's labors were confined to the drudgery of the sales department, he was a servant, Labor Code, sec. 3000; Summer v. Nevin, 4 Cal. App. 347, 350, 87 P. 1105, and therefore the finding that he was not an agent is not arbitrary or unreasonable. Respondent testified that he had no power to make contracts on behalf of Home Ice, to borrow money, to execute a lease, to extend credit; that he had never been an officer or authorized to do a particular act for the corporation; that his duties at Home Ice at the commencement of the partnership were substantially the same on November 30, 1950, and that such duties remained the same until the time of trial, May, 1951. His routine for a day's work was (1) to check the garage for troubles there; (2) check the salesmen with respect to their complaints or reports; (3) check the reports of the previous day for any unsatisfactory work; (4) circulate around the plant to see that it was in good order. Ninety-five per cent of his time was consumed by his work within the office of the Long Beach branch of the wholesaler which did only 15 per cent of the total business. Less than five per cent of his time was devoted to dealing with third persons. The testimony was that the board of directors of Home Ice never authorized him to represent it in any capacity. He looked after the trucking and ice men and the company's salesmen and as an assistant salesmanager was paid a salary. From the evidence the court found that respondent was not an officer or agent of Home Ice. Whether he was an agent of the corporation was a question of fact. The court properly received much testimony relating to that matter. The finding upon that issue is binding upon the reviewing court. Eldridge v. Mowry, 24 Cal.App. 183, 188, 140 P. 978. Where the extent of an employee's authority is not clearly defined by a writing or when such a writing is ambiguous, testimony will be received for the purpose of deriving a determination as to whether the employee was servant or agent. Starr Piano Company v. Martin, 119 Cal.App. 642, 648, 7 P.2d 383. The fact that he was referred to as the "Assistant Sales Manager" was not determinative of his actual status. Nowell v. Oswald, 96 Cal.App. 536, 537, 274 P. 423.

Other Issues.

[14] Appellant asserts that the action was not commenced in good faith; that during five years of the partnership respondent received as dividends three times his original investment; that with eight years remaining he offered to sell his interest to appellant for $75,000; that at the time of respondent's demand for a dissolution the assets were worth $193,000; that therefore, his demand was inequitable and should have been dismissed by the court.

There was nothing inequitable in respondent's demand. He was taken into a going business on the promise that he should receive one half of the net profits as they accrued. When he discovered that the enterprise was slipping from entrenched certainty to a doubtful entity, it was his right to protect the balance of his interest from spoliation. Because his share of the assets in 1950 were worth much more than his original investment in 1943, he was not obliged to sit supinely by to see whether appellant would rebuild it to higher levels. From the statistics taken from the records of the partnership, it was evident that a rare type of ingenuity would be essential to the restoration of prosperity to the house of Sinclair and it did not appear to be available.

[15] Section 15032, supra, provides for a dissolution when business can be continued only at a loss. That statute does not designate the measure or speed of the loss. But it does mean that if the partnership will continue to lose a partner may insist upon a dissolution. Respondent was reasonable in his approaches. He offered to sell his share for $75,000 or to pay the same amount for that of appellant. Not only did appellant scorn such offer but he in turn offers to pay only $60,000 for respondent's share, or to sell his own to respondent for $85,000. If a blind man had searched for bad faith in those negotiations he would surely have been led to the altar where appellant prays. It is the rule that there is no such thing as an indissoluble partnership, Bates v. McTammany, 10 Cal.2d 697, 701, 76 P.2d 513, and that of Sinclair is no exception.

Respondent has argued at length that appellant is estopped to assert the alleged inequitable conduct and has sought to establish that even if he had been the agent of Home Ice, still he would not have violated section 54 of the A. B. C. Act. Inasmuch as it has been established that respondent is not stained with any crime or inequitable conduct and was therefore at liberty to sue for an accounting, we forego discussion of respondent's further defensive arguments.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

114 Cal.App.2d 211

GREEN v. HOOSER.

Civ. 15126.

District Court of Appeal, First District,
Division 2, California.
Nov. 17, 1952.

Proceeding by divorced wife for increase in amount to be paid by husband for support of their minor children. The Superior Court, Alameda County, James R. Agee, J., entered order for plaintiff, and defendant appealed. The District Court of Appeal, Jones, J., pro tem., held that allegations that children needed medical and dental treatment for which plaintiff was unable to pay, that plaintiff could not meet already accrued medical and dental bills, that she could not support children on existing allowance, and that defendant was earning in excess of $600 per month, alleged facts sufficient to confer jurisdiction over the subject matter.

Order affirmed.

1. Appearance ⚷19(1), 20

Where a party makes a general appearance in an action, he waives process and submits himself to the jurisdiction of the court.

2. Divorce ⚷309

Divorced wife's allegations, in petition for increase in amount to be paid by husband for support of their children, that children needed medical and dental treatment for which she was unable to pay, that she could not meet already accrued medical and dental bills, that she could not support children on existing allowance, and that husband was earning in excess of $600 per month, alleged facts sufficient to confer jurisdiction over the subject matter.

3. Divorce ⚷309

In proceeding by divorced wife for increase in amount to be paid by husband for support of their two minor children, evidence that husband's income approximated $300 per month and his necessary expenditures $235 for same period, and that husband, during previous year, had received $5,000 from other sources, indicated husband's ability to pay increase of from $50 to $75 per month for each child, regardless of the increased burden of his remarriage.

Cornish & Cornish, Francis T. Cornish and Howard W. Wayne, Berkeley, for appellant.

T. Roy Hoover, Oakland, for respondent.

JONES, Justice pro tem.

This is an appeal from an order increasing the amount to be paid by appellant to his former wife for the support of their two minor children. Appellant's principal contention is that the court lacked jurisdiction to make the order.

That portion of the order pertinent to the appeal reads:

> "It is hereby ordered, adjudged and decreed, that the following order contained in the interlocutory decree of divorce and continued in the final decree of divorce in the above entitled matter to-wit: 'that defendant pay to plaintiff the sum of $50.00 per month for the support and maintenance of each of the minor children of the parties hereto commencing and payable $50.00 on the first day of August, 1948, and $50.00 on the 15th day of July, 1948, and continuing $50.00 on the first and fifteenth day of each month thereafter until the further order of this Court,' be stricken from the record and of no further force or effect and that the following order be inserted in its place to-wit: 'that defendant pay to plaintiff the sum of $75.00 per month for the support and maintenance of each of the minor children of the parties hereto commencing and payable $75.00 on the 15th day of June, 1951, and $75.00 on the 1st day of July, 1951, and continuing payable $75.00 on the 15th day and 1st day of each month thereafter until further order of this Court.'"

[1] An order to show cause was issued upon the affidavit of respondent and in response thereto appellant appeared and opposed the motion for an increase in payments for the support of the children. He took the witness stand, was sworn, and gave testimony in support of his side of the case. As is held in numerous cases where a party makes a general appearance in an action

he waives process and submits himself to the jurisdiction of the court. See Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361.

[2] Nor is there any merit to appellant's contention that no facts are set forth in respondent's affidavit sufficient to confer jurisdiction over the subject matter—the right of the children to receive adequate support from their father. The affidavit of the mother recites that the children need medical and dental treatment and that she is unable to pay for such treatment, or to pay already accrued medical and dental bills. In her affidavit she alleges further that she cannot support the children on the existing allowance of $50 per month.

As to the ability of the appellant to pay she alleges "That at the time said order was made (that incorporated into the interlocutory decree) defendant was earning the sum of $300.00 per month; that defendant is now earning in excess of $600.00 per month."

In Metson v. Metson, 56 Cal.App.2d 328, 331, 332, 132 P.2d 513, 515, it is said, "Although the petition was filed by the respondent as the divorced wife and mother of the children, she appears in a representative capacity on behalf of the children. They are the real parties in interest. Moreover, the state, itself, is a party to this proceeding in the sense that, independent of the rights of the parents, it has an interest in the welfare and maintenance of the children. The court granting the divorce *retains continuing jurisdiction* to modify or alter its orders in reference to the custody and maintenance of the children. § 138, Civ.Code. * * * Certainly, it is and should be the law, that where a petition is filed, the only jurisdictional facts that must be alleged are *the needs* of the child and *the ability* of the defendant to pay." (Emphasis added.) The needs of the children and the ability of appellant to pay the additional sum for their support are clearly stated in the affidavit. The contention that the court acted without jurisdiction has no merit.

[3] Appellant makes the added contention for a reversal of the order "That the Court erroneously refused to consider appellant's increased living costs due to his remarriage, but treated appellant's obligation to support his second wife as subordinate and not equal to his obligation to provide for his children."

The record which is brought here on a settled statement does not support this contention. The mother testified that both children are girls, aged nine and seven years respectively; that the younger daughter is in need of a tonsillectomy, and that both daughters are in need of dental work; that the cost of food for each child is approximately $40 per month; that out of the proceeds from the sale of joint tenancy property which she and appellant owned she purchased a piano for the use and education of the daughters and paid accumulated bills; that since the sale of the joint tenancy property which was occupied by her and the children rent free she is faced with the burden of providing housing for the minors.

Appellant testified that as a journeyman plumber, he earned from January 1, 1951 to May 20, 1951 net wages in the sum of $1,402.96, and that his net earnings vary from $37.16 to $98.55 per week; that in 1950 he made an income tax return of $6,000, part of which was earned by his wife. His necessary expenditures per month were given by him as $60 for payments on the house in which he is living; $16 for utilities; $90 for food; $44 for payments on his automobile; and $25 for maintaining his automobile.

Appellant's income approximates $300 per month and his necessary expenditures $235 for the same period. In addition the record discloses that during the year 1950 he received $2,300 as his share of the proceeds from the sale of the home, and $2,700 in settlement of a claim for damages for personal injuries.

With these facts before him the trial judge increased the payments to be paid for support from $50 to $75 per month for each child. The record discloses that the trial court stated that he did not believe appellant's testimony that he had expended all of the $5,000 that he had received in 1950, above his income from earnings. The record also discloses that the trial court stated "that *under the circumstances* defendant could not use his remarriage and support of the new wife and partial support of her child by a former marriage as a reason or excuse for reducing the amount reasonably necessary for the support of his own children." (Emphasis added.) This statement merely characterizes appellant's defense, and in effect says that such a defense is not conclusive. It does not mean that the court would not and did not take into consideration all of the facts and circumstances of the case in determining the ability of appellant to pay the additional award. The disclosed facts indicate an ability to pay regardless of the increased burdens of his marriage, and this is precisely what the court indicated by the questioned statement.

The order appealed from is affirmed.

GOODELL, Acting P. J., and DOOLING, J., concur.

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114 Cal.App.2d 325

SOARES et ux. v. CARTER.

Civ. 4195.

District Court of Appeal, Fourth District, California.

Nov. 21, 1952.

Action for damages allegedly resulting from failure of defendant to return land, buildings and equipment in good condition as required by lease, wherein defendant filed a cross-complaint. The Superior Court of Orange County, Kenneth E. Morrison, J., rendered a judgment adverse to defendant, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that where plaintiff pleaded as damages specific items totalling certain amount, and amendment to conform to proof pleaded specific items totalling a slightly smaller amount, and findings of amount of damages totalled up to the latter amount, conflicting portion of judgment holding that plaintiffs were damaged in amount exceeding total as found by findings would be disregarded and excess would be deducted from judgment.

Judgment affirmed as modified.

1. Appeal and Error ⇨1140(7)

Where plaintiffs in action for damages allegedly resulting from failure of defendant to return land, buildings and equipment in good condition as required by lease, pleaded as damages specific items totalling certain amount, and amendment to conform to proof pleaded specific items totalling a slightly smaller amount, and findings of amount of damages totalled up to latter amount, conflicting portion of judgment holding that plaintiffs were damaged in amount exceeding total as found by findings would be disregarded by District Court of Appeals, and excess would be deducted from judgment.

2. Pleading ⇨237(7)

In action for damages allegedly resulting from failure of defendant to return land, buildings and equipment in good condition as required by lease, trial court at conclusion of plaintiffs' case properly permitted plaintiffs to amend complaint to conform to proof relating to amount of plaintiffs' damages.

Joseph K. Coady, Bellflower, for appellant.

Mize, Kroese, Larsh & Mize, Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an action for damages based on the failure of the defendant to return land, buildings and equipment in good condition as required by the terms of a written lease. The complaint alleged damages in the amount of $2,000, without specifying what they were. A demurrer was filed. An amended complaint was then filed which alleged damages in the sum of $3054.70, including specified items amounting to $1,354.70 "and an estimate of an additional $1700 to restore" the property to its original condition. A demurrer to the amended complaint was overruled and the defendant filed an answer and cross-complaint seeking $695.20 "for money had and received."

After trial, an amendment to conform to proof was allowed which alleges that the plaintiffs had been damaged "in the total amount of $1934.32, which includes the following items:" listing certain items which total $1,349.87.

The court then filed its findings of fact and conclusions of law. So far as material here, it was found that the plaintiffs had fully complied with the lease agreement except that they owed the defendant $212 for water furnished under the terms of the lease; that the defendant had failed to maintain the land, buildings and equipment in good condition or repair; and that the defendant had refused to comply with a request to clean up and repair the premises. It was then found that by reason of this failure to maintain the land, buildings and equipment in good condition the plaintiffs had been damaged "in the total amount of $1934.82, which sum comprises the following items of damages:". This is followed by the same list of items and amounts which are contained in the amendment to conform to proof. While these amounts are not totaled in the findings, they add up to $1,349.87. It was then found that the plaintiffs are entitled to $400 attorney's fees, as provided for in the lease. As conclusions of law it was found that plaintiffs are entitled to judgment for $1,722.82 for damages after deducting the amount they owed for water, and for $400 attorney's fees; and that the defendant should take nothing by reason of his cross-complaint. Judgment was entered accordingly, and the defendant has appealed.

[1] Appellant's main contention is that the evidence is insufficient to sustain the findings and judgment with respect to the amount of the damages. The finding in question finds that the plaintiffs were damaged in the sum "of $1934.82, which sum comprises the following items of damages:", which is followed by certain items which total $1,349.87. The evidence supports the specific items thus set forth amounting to $1,349.87. The respondents point out evidence which they claim to be sufficient to support an additional $584.95. This evidence is not sufficient for that purpose. While this evidence might tend to indicate that some allowance might have been made beyond the items specified, it cannot be told therefrom what amounts might properly have been allowed. In finding that the damages amounted to $1,934.82, the court expressly stated that this sum "comprises" the specific items which follow and which amount to the lesser sum of $1,349.87. Not only should the specific items and amounts found control over the general finding, but we can find no evidence to support the latter amount. It may be noted in this connection that the respondents originally pleaded as damages specific items totalling only $1,354.70; that the amendment to conform to proof alleged specific items which totaled $1,349.87; and that the findings allowed those specific items as comprising the amount of damages. Under the circumstances, the conflicting portion of the finding should be disregarded, and the amount of the judgment should be reduced by deducting $584.95 therefrom.

No objection is made to the allowance of the attorney's fees or to the allowance for water furnished to the respondents. The appellant does contend that the court erred in refusing to allow certain credits which he claimed. The record supports the action of the court in this regard.

[2] The appellant also contends that the court erred in overruling his demurrer to the first amended complaint on the ground that it was uncertain as to what constituted the estimate of $1,700 of additional damage, and that the court erred in not sustaining objections to the introduction of evidence regarding any such uncertain damages. Aside from other considerations, the first amended complaint alleged and itemized damages amounting to more than the amount of the judgment here approved, and no prejudice appears. It is also contended that the court erred in permitting the respondents to amend the complaint at the conclusion of their case. This amendment was properly allowed to conform to the proof.

Appellant's final contention, that the court erred "in admitting certain evidence which in effect made a different contract between the parties," is without merit. The contract was in writing and, after a full hearing, the court properly refused to adopt the appellant's contentions with respect to the meaning of the contract and with respect to his claim of a different understanding of its terms.

The judgment is modified by deducting therefrom the sum of $584.95 and, as so modified, is affirmed. The appellant to recover costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.

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114 Cal.App.2d 198

WILSON v. KOPP et al.

Civ. 15184.

District Court of Appeal, First District,
Division 1, California.
Nov. 14, 1952.

Action by patron of defendants' cafe for loss of eye resulting from accident while patron was attempting to insert a screw into a shuffleboard at invitation of one defendant. The Superior Court of the State of California, in and for the County of San Mateo, Edmund Scott, J., entered judgment on verdict for defendants and denied plaintiff's motion for new trial, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence upon issues of defendants' negligence and plaintiff's contributory negligence was for jury.

Judgment affirmed.

1. Appeal and Error 🔑110, 870(6)

In civil cases, an order denying a motion for new trial is not independently appealable but is reviewable upon appeal from the judgment.

2. New Trial 🔑6

Question whether a new trial should be granted is one upon which the trial court has a broad discretion. Code Civ.Proc. § 657.

3. New Trial 🔑104(1)

Denial of motion for new trial on ground of newly discovered evidence does not constitute an abuse of discretion as a matter of law when the new evidence is merely cumulative. Code Civ.Proc. § 657.

4. New Trial 🔑140(3), 150(2)

In action by patron of defendants' cafe for loss of eye resulting from accident while patron was attempting to insert a screw into a shuffleboard at invitation of one defendant, evidence was not sufficient to establish abuse of trial court's discretion in denying motion for new trial on grounds of newly discovered evidence or of accident or surprise. Code Civ.Proc. § 657.

5. New Trial 🔑104(2)

Evidence which merely strengthens plaintiff's position on conflict existing in the evidence produced at the trial is merely "cumulative evidence".

See publication Words and Phrases, for other judicial constructions and definitions of "Cumulative Evidence".

6. New Trial 🔑105

Existence of newly discovered impeaching testimony does not compel the granting of a new trial.

7. New Trial 🔑90

A trial court may grant a motion for new trial on grounds of accident or surprise where it appears that a party was misled by a witness concerning the evidence to be expected from him or was unexpectedly presented with claimed perjured testimony, but the court is not compelled to grant the motion where the evidence relates to an issue that is obviously within the issues to be tried.

8. New Trial 🔑82

As ground for granting of new trial, surprise must be result of some fact or circumstance or situation occurring at trial which could not, in the nature of the case, reasonably have been anticipated would arise and which is of such importance as to have caused actual injury to the movant.

9. Appeal and Error 🔑1015(1)

Question whether evidence offered on motion for new trial, if accepted, would have caused the jury to have reached a different result is a matter for the trial court to consider in determining the motion.

10. Appeal and Error ⚷1046(5)

In personal injury action, record did not demonstrate such a persistent attitude of hostility on part of the trial judge that a reversal would be required.

11. Appeal and Error ⚷207

In personal injury action, where trial judge, after asking counsel how long they wanted to argue, said he would allow 40 minutes on each side, and plaintiff's counsel did not request further time, plaintiff could not complain upon appeal that argument was unduly restricted.

12. Negligence ⚷136(14, 26)

In action by patron of defendants' cafe for loss of eye resulting from accident while patron was attempting to insert a screw into a shuffleboard at invitation of one defendant, evidence upon issues of defendant's negligence and plaintiff's contributory negligence was for jury.

13. Trial ⚷228(3)

Neither party to a lawsuit is entitled to have the instructions given framed in his particular language, and as long as the instructions cover the issues involved correctly and fully state the law, fact that either party would prefer that they be otherwise expressed is immaterial.

14. Appeal and Error ⚷1064(4)

In personal injury action, giving of an undue number of instructions which, while correctly stating the rule of law involved, were worded in the negative by referring to nonrecovery of plaintiff or of nonliability of defendants did not constitute prejudicial error.

15. Trial ⚷296(3)

In action by patron of defendants' cafe for loss of eye resulting from accident while patron was attempting to insert a screw into a shuffleboard at invitation of one defendant, giving of instruction that defendants' duty to exercise care for patron's safety was fulfilled when they made the place as little dangerous as such place could reasonably be made, having regard to the purposes for which the premises were intended, was error but was cured by other instructions.

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Hugh F. Mullin, Jr., San Mateo, for appellant.

Hoffmann and Nagle and F. E. Hoffmann, San Mateo, for respondents.

PETERS, Presiding Justice.

[1] Plaintiff brought this action for damages for the loss of an eye alleged to have been caused by the negligence of defendants. The jury, by a 10 to 2 vote, brought in a verdict for defendants. Plaintiff appeals from the judgment and from the order denying his motion for a new trial. In civil cases the order denying a motion for a new trial is not independently appealable, but is reviewable on the appeal from the judgment. The independent appeal from such order must therefore be dismissed.

Plaintiff, regularly employed by Pan American Airways as a flight steward, was a regular patron of the Baywood Cafe in San Mateo, which is owned and operated by defendants. The cafe has a shuffleboard for the use of its patrons, and plaintiff had used it prior to the accident. This shuffleboard was located to the right of the entrance to the cafe and parallel to the bar. The shuffleboard is twenty-three feet long and eighteen inches wide and has eight legs. The playing surface is surrounded by gutters on both sides, the outer side of the gutters being two inches higher than the board.

On Monday, September 13, 1948, at about 5:15 p. m. plaintiff arrived at the cafe intending to participate in a shuffleboard tournament to be held that evening. Shortly after he arrived, McGarry, one of the proprietors of the cafe and one of the defendants herein, began attaching with screws towel racks to the side of the shuffleboard closest to the bar. This side of the shuffleboard is about five or six feet from the bar. While this was going on, plaintiff, who wanted to have a game with McGarry, and one Zubick, took a few practice shots on the table and then went to the bar for a bottle of beer. During this period McGarry and plaintiff engaged in some friendly banter over how hard the wood was into which McGarry, with some difficulty, was trying to insert the screws. Plaintiff testified that McGarry then handed him the screwdriver with the comment "If you think you can do it better—". McGarry testified that plaintiff said "Well, let me have a try at it," whereupon McGarry put the screwdriver on the board and plaintiff picked it up. The facts from this point on until the time of the accident are in hopeless conflict. Plaintiff testified that he took a position at the side of the board standing erect with his left foot in front of his right and grasping the screwdriver in his right hand; that he had taken about two turns with the screwdriver when both of his feet simultaneously slipped backwards out from under him because of the slippery floor; that he tried to regain his balance but fell across the shuffleboard on his chest, and that the screwdriver, which he was still holding, pierced his eyeball, which resulted in the loss of that eye. One Webber testified that sometime after the accident he was talking to McGarry and Kopp (the other defendant) and that one of them stated that plaintiff "slipped and the screwdriver jabbed him in the eye." Kopp admitted making such a statement, but declared that it was based on what someone else had told him. This weak admission, if admission it is, is the only testimony directly corroborating plaintiff's story that the slipping of his feet caused the accident.

It was the theory of defendants that plaintiff's feet did not slip upon the floor, but that as he started to use the screwdriver he braced one foot on the bar rail in back of him and had one foot on the floor when the screwdriver slipped upward, into his eye, scratching the board as it came up. Lisabeth Kopp, wife of defendant Kopp, so testified. On cross-examination she admitted that when plaintiff's motion forward occurred she could see but one foot of plaintiff, but she was positive that that foot did not slip or leave the floor. The other foot was braced against the bar rail.

McGarry also testified that when plaintiff first started to use the screwdriver he stated "I don't have enough beef on it," whereupon he braced one foot against the bar rail. This bar rail, of course, projected out from the base of the bar.

The son of defendant Kopp, then about twelve years of age, was standing about two feet from plaintiff. He testified that plaintiff's feet did not slip, that just prior to the accident plaintiff braced one foot on the bar rail and the screwdriver slipped when pressure was applied. The witness Zubick, who was called by the plaintiff, after the accident had told an investigator employed by defendants that the accident was caused by the screwdriver slipping. Zubick admitted making the statement, but testified that he was under the influence of liquor when it was made. This was denied by the investigator.

In rebuttal plaintiff reiterated that his feet and not the screwdriver slipped, and also testified as to an experiment he had made at the cafe after the first day of trial. He stated that if one of his feet had been braced against the bar rail, his body would have been so extended that he could not possibly have fallen across the shuffleboard at the time of the accident, but would have fallen to the floor. All the evidence is to the effect that plaintiff fell across the shuffleboard and did not fall to the floor.

Thus on the issue as to how the accident happened, that is, whether caused by plaintiff's feet slipping on the slippery floor or whether caused by the screwdriver slipping, the evidence was in sharp and irreconcilable conflict. This is equally true as to the evidence relating to whether or not there was wax on the floor, and whether or not defendants knew or should have known of the presence of such wax. The plaintiff, who was familiar with the premises, stated that he saw nothing different in the condition of the floor on the day of the accident than existed on other occasions. Admittedly, wax is constantly used to polish with an electric buffer the surface of the shuffleboard. Excess wax was either brushed off the board or collected with a vacuum cleaner. The pucks used in the game would slide off the board and bring some wax with them so that the wax would collect in the gutters.

There were unplugged holes in the gutters through which the excess wax would be pushed into a receptacle below. There was one such open hole a very short distance—18 to 20 inches, according to plaintiff, or 12 to 15 inches, according to Kopp—from the bracket upon which plaintiff was working when the accident happened. Wax was also kept available for the players. They would dip a towel into the wax and then use the towel to wipe off excess moisture from their hands. Wax would thus fall on the floor unless the hands were wiped over the board. The brackets on the sides of the board were being installed to hold these towels which were furnished by the cafe. The towels were also used to wipe off the board and to wipe the wax out of the gutters. McGarry admitted that wax could fall through the holes onto the floor. Witness Zubick testified that the floor was slippery the night of the accident, and that about a month before the accident he told either Kopp or McGarry that the floor was slick, and that "somebody is going to break their neck on that floor." He also testified, however, that the slippery condition was caused by the fact that the entire floor was waxed and not because of wax falling from the shuffleboard, and that he did not know of any other person who had slipped. Witness Webber testified that he examined the area around the board at 6 p. m. the night of the accident, which had occurred at 5:15 p. m., that he then found wax on the floor under the hole in the gutter closest to the bracket here involved, and that such wax was on the floor along the side of the board in such a position that it might be scuffed by those passing between the board and the bar. McGarry testified that any wax that might fall through the holes would remain under the board. Webber, who at the time of trial (April of 1951) was employed at the cafe, also testified that whenever the floor was swept there was excess wax on the floor. McGarry testified that he never saw wax on the floor. This was corroborated by Kopp and by the bartender at the cafe. McGarry also testified that there had been no complaints made to him about the condition of the floor, denied that Zubick had complained to him, and stated that there had been no prior falls. Kopp and the bartender also testified that no complaints had been made to them, and that there had been no prior falls. Kopp did testify that rubber mats were placed at the playing end of the shuffleboard to keep the players from slipping when they leaned over the board to make their shots, and that players did slip on these mats when dirt or wax got under them.

The general floor of the cafe was cleaned under contract by a janitorial service, and had been cleaned the morning of the accident. The shuffleboard was maintained by a company who generally cleaned it on the day of a tournament, and normally cleaned it on Monday, Wednesday and Friday of each week. The accident happened on a Monday.

After the jury had rendered its verdict in favor of defendants plaintiff moved for a new trial, supporting his motion with five affidavits. Bernard Brandau averred that prior and after the accident he had slipped on the floor or on the mats at the end of the shuffleboard, and that on several occasions of unknown date he had observed powdered wax on the floor in the vicinity of the holes in the gutters.

The plaintiff averred that the screwdriver introduced by defendants at the trial was not the screwdriver used by him at the time of the accident; that the screwdriver then used was shorter than the one introduced and did not have a broken point; that after the trial he discovered, in a conversation with Michael Welch, the whereabouts of the screwdriver actually used by him, and that such screwdriver is submitted with the affidavit of Welch. This affiant also deposes that these facts were not known at the time of the trial and could not, with due diligence, have been ascertained at that time.

One Archie Scraper, a cook at the cafe at the time of the accident, deposed that he was not on duty at the time of the accident but that he came into the cafe shortly after the accident occurred, and that defendant Kopp then told him that Lizabeth Kopp, at the time of the accident, was in the kitchen. Mrs. Kopp had testified at the trial that she was at the end of the bar and saw that plaintiff's foot did not slip. Scraper further averred that while working at the establishment he had never seen the screwdriver defendants introduced into evidence, but that there was a larger and longer screwdriver customarily kept on a shelf in the kitchen. This is, apparently, a third screwdriver, and has no relation to the present controversy. Scraper further deposed that, prior to the accident, Welch brought to the cafe the shorter screwdriver referred to in plaintiff's affidavit. This affiant further deposed that prior and after the accident he had slipped on the floor both at the end of the shuffleboard and on the side closest to the bar, and that he had observed wax on the floor under the holes in the shuffleboard.

Welch, a dishwasher at the cafe at the time of the accident, averred that he was required to make minor repairs around the premises; that there was in the kitchen the large screwdriver referred to by Scraper; that this large screwdriver was not the one introduced by defendants at the trial; that he had brought some of his own tools to the cafe; that among these tools was the shorter screwdriver referred to by plaintiff in his affidavit and that he had removed all of his tools from the premises when he left his employment with the cafe. This screwdriver was submitted as an exhibit with this affidavit. This affiant further deposed that prior to and after the accident he had slipped on the floor while playing shuffleboard at the end of the table, and that he had observed wax on the floor.

The attorney for plaintiff averred that, in preparation for the trial, he had interviewed all witnesses that he was advised knew anything about the accident; that he had used reasonable diligence to ascertain the identity of all witnesses; that he did not learn of the identity or nature of the testimony of Brandau, Scraper or Welch until after the date of the trial; and that he did not know of the existence of the screwdriver introduced at the trial until defendants produced it at the trial.

McGarry filed a counter-affidavit denying, on information and belief, all the allegations of the plaintiff's five affidavits. The trial court denied the motion for a new trial.

One of the major contentions of plaintiff on this appeal is that the trial court abused its discretion in denying the motion for a new trial on the grounds of newly discovered evidence, accident and surprise.

Under section 657 of the Code of Civil Procedure a new trial may be granted on the ground of "Accident or surprise, which ordinary prudence could not have guarded against" or on the ground of "Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial".

[2, 3] Of course, the question is whether, on the affidavits submitted, the trial court was compelled to grant the new trial, not whether the affidavits would have supported an order granting the new trial. This is a field in which the trial court has a broad discretion, so that the precise question presented is whether the trial court, as a matter of law, abused that discretion in denying the motion. So far as the ground of newly discovered evidence is concerned, it has consistently been held that it does not constitute an abuse of discretion as a matter of law to deny the motion when the new evidence is merely cumulative. Carpenter v. Gibson, 80 Cal.App.2d 269, 181 P.2d 953; Sabathe v. Gale, 83 Cal.App.2d 182, 188 P.2d 68; Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 221 P.2d 73, 23 A.L.R.2d 216. It is therefore necessary to review the evidence introduced at the trial in reference to the screwdriver.

The screwdriver introduced into evidence is a heavy screwdriver, ten inches long, with a plastic handle and a broken point. The Welch screwdriver is a very light screwdriver six and three-quarters inches long, with a plastic handle and a good point. Before any screwdriver was introduced into evidence plaintiff testified that the screwdriver he was using was about ten inches long, and was apparently new, with a yellow composition handle. This is a pretty good description (except for the broken point) of the screwdriver introduced by defendants as the screwdriver involved in the accident, and would be a very inaccurate description of the Welch screwdriver later discovered.

The screwdriver used at the trial was introduced during the testimony of defendant Kopp, who testified that it was the screwdriver used by plaintiff at the time of the accident; that it had been in his possession ever since the accident; and that it had in no way been altered since the accident. McGarry also testified that the screwdriver introduced was the one used by plaintiff. The plaintiff, in rebuttal, testified as to the test made by him after the trial, admitted that during this test he did not use any screwdriver, and was then shown the screwdriver introduced into evidence and asked if that was the screwdriver involved. He replied: "I don't think that is the screwdriver," and when asked if it was about the size of the screwdriver used, he replied: "Approximately, maybe an inch or two longer," that the one he had used "was a smaller screwdriver." The Welch screwdriver is so different in size, weight and length from the one introduced into evidence, that it is highly improbable that plaintiff would have described it as "approximately" the same size as the one introduced.

[4–6] There was no abuse of discretion in denying the motion for a new trial because of the claimed newly discovered evidence in reference to the Welch screwdriver. Not only could the trial court have believed that the affidavits did not show due diligence, but it is obvious that the proffered evidence was merely cumulative, in that it would strengthen plaintiff's position on a conflict already existing in the evidence produced at the trial. This, under the rule of the authorities already cited, warranted the trial court in denying the motion. Insofar as the new screwdriver would impeach defendants' testimony concerning the screwdriver introduced into evidence, it is the rule that newly discovered impeaching testimony alone does not compel the granting of a new trial. Anderson v. Freis, 61 Cal.App.2d 159, 142 P.2d 330. Of course, insofar as the affidavits disclose further evidence of slipping episodes, the proffered evidence is clearly cumulative and does not compel the granting of the motion.

[7, 8] As to the denial of the motion based on accident and surprise, that too was well within the legal discretion of the trial court. While a trial court may grant a motion for a new trial on these grounds where it appears that a party is misled by a witness as to the evidence expected from him, or is unexpectedly presented with claimed perjured testimony, the court is not compelled to grant the motion where the evidence relates to an issue that is obviously within the issues to be tried. In Rudin v. Luman, 53 Cal.App. 212, at page 221, 199 P. 874, 878, the court stated the proper rule as follows: "The 'surprise' mentioned by the statute must be the result of some fact or circumstance or situation occurring at the trial which could not in the nature of the case reasonably have been anticipated would arise and which is of such importance or magnitude in its influence upon the result arrived at from the trial as to have produced as against him or his rights injury or damage. The mere giving of testimony contrary to the interests of a party, or even the fact that false testimony has thus been given, although wholly unexpected by the party against whom it is given, will not itself always operate as a predicate for the awarding of a new trial of the issue."

[9] Moreover, it is to be noted that at no time during the trial did the plaintiff claim that he was surprised by the production of the screwdriver, nor did he request a continuance to secure opposing evidence. These factors, see Kauffman v. De Mutiis, 31 Cal.2d 429, 189 P.2d 271, while not conclusive, see Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960, could be weighed by the trial judge in considering the motion. The fact that the proffered testimony would be cumulative is also a factor that the trial court could consider. It is by no means certain that the proffered evidence is of such a nature that, if accepted, a different result would

have been reached by the jury. That too, was a matter the trial court was entitled to consider in determining the motion. Jennings v. American President Lines, 61 Cal.App.2d 417, 143 P.2d 349, 144 P.2d 54; Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960. Under these circumstances there was no abuse of discretion in denying the motion for a new trial.

[10] The plaintiff's next major contention is that the trial judge was guilty of prejudicial misconduct warranting a reversal. Plaintiff lists a series of occurrences, including certain rulings on evidence, that occurred during the trial, and contends that they demonstrate a persistent hostility towards plaintiff and his counsel and an undue friendliness towards defendants and their counsel. No useful purpose would be served by setting forth these contentions in detail. Most of the occurrences are trivial in nature. The rulings on evidence were not prejudicial. It is true that occasionally the trial judge was irascible, and occasionally made a comment or two that well could have been left unsaid, but not only were no assignments of error made, but the record certainly does not demonstrate such a persistent attitude of hostility that a reversal is required. We have read the entire record. We believe it demonstrates that plaintiff received a fair trial, and that the remarks and actions of the trial judge of which complaint is made could not possibly have affected the verdict. It should also be pointed out that the trial court correctly instructed the jury that the court expressed no opinion on the evidence; that it was the jury's function to determine all questions of fact; that statements by court and counsel outside the record should be disregarded by the jury; that if the "Court made any statement which would seem to you to reflect on any counsel or any witness or seemed to you to indicate that the court had some opinion upon the merits of the case, or upon some fact or issue involved in the case, then, you are admonished to disregard such statement, if such statement was made, in reaching a verdict." These assignments of error are without merit. Germ v. City and County of San Francisco, 99 Cal.App.2d 404, 222 P.2d 122.

[11] Plaintiff also complains that he was denied a fair trial because the trial judge limited each side to forty minutes argument to the jury. Plaintiff made no request for further time in the trial court, and made no complaint of the limitation. At the close of the trial the judge asked counsel how long they wanted to argue. Counsel for plaintiff replied: "As short as I can, consistent with the case. I am not going to take any more time than is necessary." The court replied that it would like to know how long was desired and asked if half an hour would be sufficient. Defendants' counsel replied: "That should be enough," whereupon the court stated: "I will allow 40 minutes a side." Plaintiff's counsel remained silent and neither then nor later requested further time. This being so, the contention that he was unduly restricted is without merit.

[12] The contentions that the evidence compels a holding, as a matter of law, that defendants were negligent, and that plaintiff was not guilty of contributory negligence, need not seriously be considered. The evidence set forth in this opinion demonstrates that these were fact questions properly left to the jury.

[13, 14] The last major contention of plaintiff is to claim error in the giving or refusing to give instructions. The trial court refused to give several instructions offered by plaintiff but, in most cases, did give other instructions expressing the concept and fully covering the subject matter involved. Of course, neither party is entitled to have the instructions framed in his particular language. As long as the instructions cover the issues involved and correctly and fully state the law, the fact that either party would prefer that they be otherwise expressed is immaterial. We have read the entire charge, including the instructions refused or modified. The only possible criticism of the charge as a whole is that there does seem to be an undue number of the instructions which, while correctly stating the rule of law involved,

are worded in the negative, that is, that are worded in words of nonrecovery by plaintiff or of nonliability of defendants. It would have been fairer to both sides had comparable plaintiff's instructions been given, or had these instructions been framed in a more objective manner. However, the instructions given did correctly state the law and amply covered the subject matter involved. We do not think that prejudicial error was caused by the form of these instructions.

[15] There was one instruction given that was erroneous. The court, at defendants' request, gave the following instruction: "I instruct you that the proprietors of a place of business are bound to exercise only the degree of care for the safety of their patrons that would be expected of an ordinarily careful and prudent person under like circumstances, and their duty is fulfilled when they make the place as little dangerous as such a place can reasonably be made, having regard to the purposes for which said premises are intended to be used." Plaintiff properly complains of that portion of the instruction that told the jury that it was only the duty of a proprietor of a place of business towards his patrons to maintain the premises "as little dangerous as such a place can reasonably be made." It was no doubt error to thus suggest that the premises can be a "little dangerous" to the knowledge of the proprietor without imposing liability. But the ambiguity in this instruction was undoubtedly clarified and cured by several other instructions given on the duty of proprietors. Just prior to the challenged instruction the trial court gave two instructions on the same subject matter that had been suggested by plaintiff. The first told the jury that one who enters a place of business to purchase a commodity or service is an invitee, and that the "law imposes on the owner of such an establishment" the duty of exercising ordinary care so as not unnecessarily to expose the invitee to danger or accident, and, to that end, to keep in a reasonably safe condition the aisles, passageways and general store premises made available for the invitee's use.

The second instruction given at plaintiff's request, and which immediately precedes the challenged instruction, told the jury that: "In the absence of appearances that caution or would caution a reasonably prudent person in like position, to the contrary, the invitee has a right to assume that the premises he was invited to enter are reasonably safe for the purpose for which the invitation was extended, and to act on that assumption."

Immediately following the challenged instruction the court correctly defined the duty of a proprietor as follows: "You are instructed that the proprietor of a building who invites others to enter said building owes to such persons who thus enter, the duty to have the building in a reasonable [sic] safe condition; he is not an insurer of such persons, nor does the mere occurrence of injury on his premises create any presumption of negligence on his part. His responsibility is not absolute and he is only required to use ordinary care for the safety of persons he invites to come upon his premises. * * *"

In view of these correct instructions it is quite obvious that the ambiguous language used in the challenged instruction could not have misled the jury. The error that occurred was clearly cured by the other instructions. Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346.

The other contentions made by plaintiff in reference to the instructions are without merit.

The appeal from the order denying the motion for a new trial is dismissed; the judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

114 Cal.App.2d 257

TOMPKINS v. HOGE et al.

Civ. 19019.

District Court of Appeal, Second District,
Division 3, California.

Nov. 18, 1952.

Hearing Denied Jan. 15, 1953.

Niece brought action against aunt and another for declaratory judgment as to niece's rights under agreement by aunt to give all her property remaining at her death to niece if niece would leave position in New York as teacher and come to California and act as housekeeper for aunt during lifetime of aunt. The Superior Court of Los Angeles County entered judgment for niece, and aunt did not appeal. Thereafter the Superior Court issued order to show cause why the aunt should not be restrained from disposing, encumbering, hiding or covering up her property. The Superior Court, Allen W. Ashburn, J., entered a judgment granting an injunction, and aunt appealed. The District Court of Appeal, Shinn, P. J., held that agreement would not be specifically enforced in equity and that aunt could not be enjoined from breaking agreement, since services to be rendered by niece were not yet completed and since niece had an adequate remedy at law.

Judgment reversed.

1. Appeal and Error ⚷875

Where no appeal was taken by defendant from judgment for plaintiff on first trial, and such judgment became final, and thereafter order to show cause why defendant should not be restrained from violating the judgment was issued, and a judgment restraining defendant from violating original judgment was entered, and defendant appealed from judgment granting injunction, alleged error in original judgment in awarding plaintiff relief to which she was not legally entitled was not subject to review.

2. Specific Performance ⚷86, 94

Agreement by aunt to give all of her property remaining at her death to niece if niece would leave her position in New York as teacher and come to California and act as housekeeper for aunt during lifetime of aunt would not be specifically enforced in equity, and aunt would not be enjoined from breaking the agreement, since services to be rendered by niece were yet uncompleted, and since niece had an adequate remedy at law. Civ.Code, §§ 3386, 3390, 3423.

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George R. Maury, Los Angeles, for appellant.

Bodkin, Breslin & Luddy, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff brought this action for a declaration of her rights under an agreement, partly oral and partly written, with her aunt, Adaline Hoge, a widow, referred to as defendant. The alleged agreement was a promise by defendant that if plaintiff would come from New York State and live in the home of defendant, keep house, cook, care for and look after said Adaline Hoge and her then husband, William H. Hoge, during the remainder of their lives, they and each of them would provide a home and a good living for plaintiff, and that upon their deaths they would devise and bequeath all of their property, real, personal and mixed, to plaintiff, and plaintiff would receive all of their property upon their deaths; defendant and her husband were then in poor health and defendant was gradually going blind. Plaintiff, relying upon such promises, accepted defendant's offer. Defendant's husband died before plaintiff left New York but defendant stated to plaintiff that if she would look after defendant and keep house and cook for her and care for her during the remainder of her life she would receive all of defendant's property in accordance with her said offer. Plaintiff gave up her position as a school teacher and a salary of $2,500 per year, came to Los Angeles and moved into the home of defendant, and since February 10, 1944, has kept house, cooked for and looked after and cared for defendant, and has fully and faithfully kept and performed her contract.

A controversy has arisen in that plaintiff maintains that an agreement was made as alleged and that she has faithfully performed it upon her part, while defendant contends that plaintiff has not faithfully performed her contract, that defendant is not required to leave any property to plaintiff but is free to dispose of it in her lifetime or by will in any manner she may choose. In a second cause of action the complaint set forth certain parcels of real and personal property of the alleged value of $65,000 alleged to have been owned by defendant at the time of the making of the agreement. It was also alleged that defendant had converted certain securities into cash and had secreted the cash. It was alleged that one August Bracero, named as a defendant, well knowing of the said agreement, had aided and abetted defendant in secreting securities and money, and it was alleged that said two defendants would continue to secrete and hide money so that at the death of defendant it will be impossible for plaintiff to trace said funds or enforce her contract. It was alleged that defendant and said Bracero have conspired to mistreat plaintiff and that defendant has not adequately supported plaintiff. Plaintiff alleged that she was ready, able and willing to perform her services in the future, if permitted to do so but that unless restrained, defendant and said Bracero would convert all defendant's property into cash and secrete the money so that plaintiff would be prevented from enforcing her contract or recovering from the estate of defendant upon her death any compensation for the services she has rendered. Plaintiff asked for a declaratory judgment establishing her rights in accordance with the alleged agreement and providing that she is entitled to receive whatever remains of the property of defendant upon her death, and that the defendants be restrained from transferring, encumbering or covering up any property of the defendant for the purpose of defeating the claimed rights of plaintiff.

Mrs. Hoge answered, admitting she had written to plaintiff sometime in 1943 "that if plaintiff wished to come to California and make her home with this defendant and her husband and cook and do the housekeeping for defendant and her husband and care for them when they needed it during their lives that she could do so and that when this defendant and her husband died plaintiff could have whatever they had left but that plaintiff must learn to cook and become a competent housekeeper." The answer admitted that plaintiff accepted defendant's offer, that she entered defendant's home, has done a part of the work but alleged that she has not taken care of defendant competently or carefully or conscientiously. It was alleged that plaintiff has not done more than 20 per cent of the housework and cooking and has been disrespectful, abusive and discourteous to defendant and her friends and employees. It was denied that defendant has secreted any money or other property, or that she has done any act or thing for the purpose of defeating any claims of the plaintiff.

The court found that plaintiff gave up her position in New York in reliance upon the promise of defendant; that the agreement was as alleged in the complaint except that defendant agreed to pay plaintiff $300 per year at the rate of $25 per month in addition to defendant's promise to will her property to plaintiff. It was found that plaintiff has at all times fully and faithfully kept and performed her contract; that at all times prior to the filing of the complaint and until May, 1950, defendant paid plaintiff $25 per month as agreed. It was found that a controversy exists as alleged in the complaint. The rights of plaintiff were declared by the judgment as follows: (1) Plaintiff is entitled to occupy a room in defendant's home as long as she substantially performs her agreement; or if the renting of said room becomes absolutely necessary, plaintiff shall be furnished other suitable quarters; (2) plaintiff is entitled to her share of the heat furnished for the room and bathroom and to light and water, also to a share of the food purchased by defendant; (3) that plaintiff is a member of the family and companion and not a mere servant; (4) that plaintiff is not over defendant August Bracero as his superior, nor is he on an equality with her socially; (5) that under the terms of the contract plaintiff is not bound to eat or otherwise fraternize with August Bracero; (6) defendant has a right to employ August Bracero but plaintiff has no right to revile August Bracero or to antagonize him or to order him around; (7) that defendant has no right to permit August Bracero to revile plaintiff or to antagonize her or to order her around; (8) that plaintiff is obligated to resume her household duties if requested by defendant; (9) that defendant is entitled to require plaintiff to cook and wash dishes and drive the automobile so long as in so doing defendant acts in good faith; (10) plaintiff is not required to cook or wash dishes for Bracero unless defendant requests it in good faith; (11) if requested by defendant plaintiff must do her best to learn to drive an automobile; (12) that if defendant does not wish to avail herself of plaintiff's services she need not do so but if plaintiff makes herself available and is ready to perform the contract, defendant must perform on her part, including the payment of $25 per month to plaintiff and furnishing the use of the room, living quarters, meals and living in the home and leaving her property to plaintiff by will; (13) neither plaintiff nor defendant is entitled to curse or revile or needlessly annoy or heckle the other; (14) if defendant is ill plaintiff must care for her to the best of her ability and in such manner as to cause the least possible friction. It was adjudged that plaintiff has performed her contract in all matters in which full performance has been required of her. It was declared to be not true that defendant had removed or sold her stocks or placed the same in a safe deposit box in the names of herself and Bracero; she did, however, receive some $11,000 in cash, part of which she hid in her home and the remainder she placed in a safe deposit box and the moneys were taken from depositaries and were hidden for the purpose of concealing the same from plaintiff; that August Bracero has aided and abetted defendant in removing and hiding said money. It was declared that defendant is required to leave all her property to plaintiff, that she "is not free to dispose of her property in any manner she sees fit during her lifetime or by will, except to will said property to plaintiff, so long as plaintiff faithfully and fully performs the things plaintiff agreed to do, but defendant Adaline Hoge has a right to use all or so much of her property as may be reasonably necessary for her support, care and maintenance during her entire life, including paying a reasonable salary to August Bracero for services rendered to defendant Adaline Hoge."

The court declared that the evidence did not show that it was necessary that defendants be restrained from concealing money or property, or that the defendant would sell her securities and hide the money so that plaintiff's rights will be defeated. It was also found that defendant has failed to pay for plaintiff's medical care, has failed to adequately support plaintiff and has made unkind and unwarranted statements about plaintiff. It was found to be not true that defendant intends to sell her real property or to hide any of her money. The court found it was not necessary presently to issue an injunction but that "it is necessary and convenient that the court retain jurisdiction to make such other and further orders as may be necessary and advisable in the future, particularly with respect to the sale of the real property belonging to the defendant Adaline Hoge, and for the purpose of making such other and further orders regarding the rights and duties of the parties to this action under the terms of said contract." By the judgment the court reserved jurisdiction to make "other, further and different orders and decrees regarding the property, to temporarily restrain or to enjoin defendants from selling, assigning, transferring, covering up said property or from doing anything for the purpose of defrauding plaintiff or avoiding the performance of said contract in good faith, and to make such other and further orders, judgments and decrees as may be proper and necessary hereafter." This judgment was entered September 18, 1950.

In March, 1951, upon the affidavit of plaintiff the court issued an order to show cause why defendant should not be restrained from disposing, encumbering, hiding or covering up real or personal property, and from giving August Bracero any money as a gift, or in excess of what he earned. In the hearing which culminated in September, 1951, the court made further findings which incorporated a number of those previously made and which found certain additional facts. It was found that ever since the first trial defendant had refused to permit plaintiff to perform any of her duties; that defendant had sold securities for $14,530.93 which she received in currency and hid away; that at the time of the first trial defendant had securities and cash of the value of $17,500 and that at the time of the hearing on September 10, 1951, defendant accounted for said sum with the exception of something more than $1,500 for which she did not account. It was found that prior to the first trial defendant's total reasonable living expenses were about $450 per month, whereas since that trial defendant had been expending more than $775 per month, which was an unreasonable sum for maintenance, care and support. It was found that defendant intends to defeat the rights of plaintiff under the judgment theretofore rendered in that she had secreted her money and property in the past and would continue to do so in order to defeat plaintiff's rights under the agreement. The court issued an injunction restraining the defendant and others acting for her from giving away, selling, disposing or encumbering, hiding or covering up all or any part of her real or personal property, save and except that she may use so much of her money as may be necessary for her reasonable care, maintenance and support, and restraining defendant from giving any money to August Bracero or anyone else, except the payment in reasonable amounts for services rendered.

Defendant appeals and urges two grounds for a reversal of the judgment: First, that the court was without jurisdiction to render the second judgment, having exhausted its powers in the rendition of the first judgment; and second, both judgments are in error and the second one should be reversed for the reason that it purports to grant specific relief to plaintiff which is not justified by facts proved and found.

[1] No appeal was taken from the first judgment and it has become final. If there was error in awarding plaintiff relief to which she was not legally entitled, such error is not subject to review upon the present appeal. The first judgment must therefore stand as the final adjudication of the making of the agreement and of the existence of all subsequent facts found. Plaintiff justifies the second judgment upon the ground that the court properly retained jurisdiction to make its first judgment effective and that the second judgment accomplishes, and was intended to accomplish, no other purpose. We find it unnecessary to consider this point.

The questions are thus presented whether the second judgment purports to compel specific performance of the agreement by defendant and whether such relief could properly be granted. Manifestly, it does demand specific performance. To be sure, it does not require defendant to make a will, and therefore does not require complete performance, but it does purport to enforce compliance with an obligation, supplied by implication, that defendant shall conserve her estate and limit her expenditures to such sums as may be necessary for her reasonable care, maintenance and support, and as may be earned in the future by August Bracero for services rendered defendant.

The contract as found by the court did not require defendant to conserve her estate or obligate her to possess property at the time of her death. Although she did not promise to live frugally or that she would not make any gifts to others, the judgment imposed that duty.

Since the first judgment is final, the limitations which it places upon defendant's use of her property must be regarded as a correct construction of the agreement.

[2] In our discussion we shall assume, as the answer admits, that the agreement was in writing and therefore not invalid under § 1973, Code of Civil Procedure and § 1624, Civil Code. There are two valid objections to enforcement of the agreement in equity. The consideration for defendant's agreement was that plaintiff's services should be rendered throughout defendant's lifetime and those services remain uncompleted; plaintiff has an adequate remedy at law, for damages, or in *quantum meruit*.

The factual situation is one that is of common occurrence. Whenever it has arisen the courts have held that one who has undertaken to render personal services as yet uncompleted, may not recover upon the agreement the compensation agreed to be paid for full performance.

In the early case of Cooper v. Pena, 21 Cal. 403, the court refused specific performance of an agreement to convey land in consideration of personal services which had not been fully performed saying: "So far as the agreement is unperformed, the plaintiff cannot be compelled to perform it on his part, for equity will not enforce a contract for personal services, but leave the party to his remedy at law. * * * We have already stated that the plaintiff cannot be compelled to complete the services which he agreed to perform, and the fact that he has offered to complete them is not equivalent to actual performance. * * * As this is an obligation which the court cannot enforce, there is no principle which would justify it in enforcing the obligation on the other side; and the only course is to decline to interfere, and leave the plaintiff to his remedy for damages."

The principle is statutory, Civ.Code, §§ 3386, 3390, and has been applied in many cases of agreements to leave property by will or deed as consideration for personal services. And another ground for denying equitable relief is that if the services are such as to be compensable in damages or in *quantum meruit*, the remedy at law is adequate and exclusive. O'Brien v. Perry, 130 Cal. 526, 62 P. 927; Moore v. Tuohy, 142 Cal. 342, 75 P. 896; Flood v. Templeton, 148 Cal. 374, 83 P. 148; Pacific, etc., Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 P. 623; Morrison v. Land, 169 Cal. 580, 147 P. 259; Berry v. Moulie, 180 Cal. 137, 179 P. 686; Roy v. Pos, 183 Cal. 359, 191 P. 542; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Poultry Producers, etc., v. Barlow, 189 Cal. 278, 208 P. 93; O'Brien v. O'Brien, 197 Cal. 577, 588, 241 P. 861; Brown v. Freese, 28 Cal.App.2d 608, 83 P.2d 82; Lovelace v. Free, 140 Cal.App. 264, 35 P.2d 342; Zaring v. Brown, 41 Cal.App.2d 227, 106 P.2d 224; DeMattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Murdock v. Swanson, 85 Cal.App.2d 380, 193 P.2d 81.

In Murdock v. Swanson, supra, 85 Cal. App.2d 380, 193 P.2d 81, the plaintiff sued on a claim against an estate based upon an alleged oral contract to make a will. The complaint pleaded an agreement under which the decedent would make a will in favor of plaintiff in consideration of care for the decedent, the rendition of personal services, and the furnishing of certain goods to her and assistance in caring for her property, and if necessary care for decedent in plaintiff's home. In affirming a judgment of dismissal after demurrers were sustained, the court stated, 85 Cal.App.2d at page 384, 193 P.2d at page 83: "It is well settled that equity will not intervene in such cases involving payment for personal services since the remedy at law is adequate. Zaring v. Brown, 41 Cal.App.2d 227, 106 P. 2d 224; Morrison v. Land, 169 Cal. 580, 147 P. 259; DeMattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522. There can be no question that there was also an adequate remedy at law here with respect to any goods or articles furnished to the decedent by the appellant." It was also alleged therein that it became necessary for plaintiff to spend so much time with the decedent that she found it impossible to continue to operate her business of a beauty shop, that she sold the same at great loss with respect to the good will and future profit, and that in carrying out her agreement she was obliged to neglect many of her marital, social and household duties and remain away from her home and husband for many hours at a time. With respect to these allegations, the court said, 85 Cal.App.2d at page 385, 193 P. 2d at page 84: "The allegations of loss here are indefinite, and are to the effect that the appellant sold the beauty parlor merely in order to be in a better position to render the services called for by her agreement with the decedent. There is no allegation in this cause of action that any such thing was requested by the decedent or even known to her. If any loss occurred in this respect this was an element which could have been included in showing the value of the services she rendered, and a remedy at law existed. No such change of position here appears as to make it impossible for plaintiff to obtain compensation for anything she did other than through equitable relief, or upon the constructive trust theory as it has always been applied." Plaintiff here alleged she gave up a salary of $2,500 per year and that she could have retired as a school teacher upon a pension of about $50 per month when she had attained the age of 70 years, or in 1947, and that defendant was aware of that fact. The detriment suffered by plaintiff in resigning her position, with respect both to loss of salary and pension rights, would have been proper elements of damage in an action to recover for the value of plaintiff's services. The fact that plaintiff gave up association with her friends and relatives in New York was comparable to the neglect of marital, social and household duties and absence from her home and husband, alleged by the plaintiff in the Murdock case. There was no finding that by reason of the facts found plaintiff suffered detriment in coming into the home of defendant that could not be compensated for in money. We think such a finding would have had no basis in the evidence. Anyone who goes into the home of another, there to reside permanently, gives up associations and ways of life for others that may turn out to be less desirable. Inability to be restored to the former status is not a good ground for equitable relief unless to deny it would operate as a fraud upon the party seeking relief. This is not such a case and was not considered by the trial court to be one. Such detriment as plaintiff suffered was compensable in damages and her claim therefor was one to be prosecuted at law and not in equity. See Zaring v. Brown, supra, 41 Cal.App.2d 227, 106 P.2d 224.

Plaintiff has no rights other than those derived from the agreement. The restraints placed upon defendant by the second judgment purport to enforce an obligation to conserve her estate for the benefit of plaintiff. This restraint is only a means to the end that there will be estate remaining upon the death of defendant to be subjected to whatever claims plaintiff may establish under the agreement. An injunction may not be granted to prevent breach of an agreement to render personal services of the nature of those agreed to be rendered by plaintiff. Civ.Code, § 3423; Lovelace v. Free, supra, 140 Cal.App. 264, 35 P.2d 342.

The judgment entered October 4, 1951, is reversed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

114 Cal.App.2d 267

In re ROBERSON'S ESTATE.

MARSH et al. v. TILLIE et al.

Civ. 4411.

District Court of Appeal, Fourth District,
California.

Nov. 18, 1952.

Rehearing Denied Dec. 9, 1952.

Hearing Denied Jan. 15, 1953.

Contest of will before probate. The Superior Court, San Bernardino County, Martin J. Coughlin, J., entered judgment for contestants, and proponents appealed. The District Court of Appeal, Per Curiam, held that notice which stated that proponents appealed from denial of motions for nonsuit, directed verdict, judgment notwithstanding the verdict, new trial, and from the verdict itself, but which made no mention of the judgment, was insufficient to confer jurisdiction of appeal.

Appeal dismissed.

1. Wills 🔑358

In will contest, neither an order denying motion for new trial, an order denying motion for nonsuit, an order denying motion for directed verdict, an order denying judgment notwithstanding the verdict, nor the verdict itself, are appealable. Probate Code, § 1240.

2. Appeal and Error 🔑417(1)

A notice of appeal, if otherwise sufficient, may be a part of the same paper directing the clerk to prepare a record.

3. Wills 🔑367

In will contest, notice which stated that proponents appealed from denial of their motions for nonsuit, directed verdict, judgment notwithstanding the verdict, and new trial, and from verdict favoring contestants, but which made no mention of the judgment which had been entered, was insufficient to confer jurisdiction of appeal. Rules on Appeal, rule 1(a); Probate Code, § 1240.

4. Appeal and Error ⚷417(1)

Notice to prepare transcript which made no reference to judgment, except to state that notice of appeal from judgment had been heretofore filed, and which disclosed on its face that it was not intended as giving notice of present intention to appeal from the judgment or from anything else, or as a compliance with rule setting forth requirements for notice of appeal, could not be construed into an additional and new notice of appeal. Rules on Appeal, rule 1(a); Probate Code, § 1240.

5. Appeal and Error ⚷417(1)

While notice of appeal required by rule is to be liberally construed to effectuate purpose of rule, notice must substantially state a present intention, and show that the party is, by means of that notice, presently appealing from some specified thing. Rules on appeal, rule 1(a); Probate Code, § 1240.

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David W. Williams, Los Angeles, Joseph V. Mazziotta, San Bernardino, for appellants.

E. John Eriksson, Homer M. Bail, San Bernardino, for respondents.

PER CURIAM.

This is a contest of a will before probate. The respondents filed a contest to a will dated July 18, 1949. A jury found that the deceased was of unsound mind at the time the will was executed. A judgment denying admission of the will to probate was filed on January 12, 1951, and entered on the same day. The proponents moved for a judgment notwithstanding the verdict and for a new trial, which motions were denied on March 12, 1951.

On March 26, 1951, the proponents filed a notice that they "hereby appeal" from the denial of their motion for a nonsuit, from the denial of their motion for a directed verdict, from the denial of their motion for a judgment notwithstanding the verdict, from the denial of their motion for a new trial, and from "the verdict of the jury favoring contestants and from the whole thereof." On the same day, they filed with the clerk a notice and request "for a reporter and clerk's transcript". This notice first recites that the proponents "have heretofore filed notice of appeal from the judgment in said action" and then requests that a reporter's and clerk's transcript be made up and prepared, including all testimony and evidence offered or received, all rulings made, and all objections or exceptions of counsel. It then gives "further notice" that proponents desire to have included in the record on appeal all exhibits, the petition for letters, the petition to revoke will before probate, the answer to that petition, the motion for judgment notwithstanding the verdict, the motion for new trial, and the "findings of fact and conclusions of law."

The appellants' sole contention is that there is a lack of substantial evidence to support the jury's verdict finding that the deceased was of unsound mind at the time the will in question was executed. The matter of the judgment was not mentioned in the opening brief. The respondents first contend that no appeal was taken from the judgment, or from any of the appealable orders mentioned in section 1240 of the Probate Code, and that it follows that this court is without jurisdiction to decide the question presented by appellants. While a motion to dismiss this appeal was earlier denied, we think this contention should be sustained.

[1] The matters mentioned in the notice of appeal are not appealable; an order denying a motion for a new trial, In re Estate of Dopkins, 34 Cal.2d 568, 212 P.2d 886; an order denying a motion for a nonsuit, In re Estate of Patterson, 220 Cal. 370, 31 P.2d 197; an order denying a motion for a directed verdict, In re Estate of Alegria, 87 Cal.App.2d 645, 197 P.2d 571; an order denying a judgment notwithstanding the verdict, In re Estate of Green, 25 Cal.2d 535, 154 P.2d 692; and no appeal lies from

the verdict. In re Estate of Schlyen, 105 Cal.App.2d 648, 234 P.2d 211.

[2] It has been held that a notice of appeal, if otherwise sufficient, may be a part of the same paper directing the clerk to prepare a record. And also that a notice of appeal is sufficient which states that the appealing party "desires and intends to appeal from the judgment." Purity Springs Water Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 P. 810; Anderson v. Standard Lumber Co., 60 Cal.App. 445, 213 P. 65; Magruder v. City of Redwood, 203 Cal. 665, 265 P. 806; Mamer v. Superior Court, 15 Cal.2d 569, 103 P.2d 961.

Under a former statute, requiring that the notice of appeal give notice that the party "does thereby appeal", it was held that a notice to a clerk requesting a transcript which stated that the appealing party "has appealed" was not a sufficient compliance with the statute; Wall v. Hunter, 186 Cal. 473, 199 P. 775, 776, and that a notice which merely called for the preparation of a record should not "be turned by construction into a notice of appeal and held to be good, as such, under a section with which it does not comply." Boling v. Alton, 162 Cal. 297, 122 P. 461, 462.

The requirements for a notice of appeal are now stated in Rule 1(a) of the Rules on Appeal, which provides that an appeal from a judgment is taken by filing a notice of appeal therefrom; that such a notice is sufficient "if it states in substance that the appellant appeals from a specified judgment"; and that a notice of appeal shall be liberally construed in favor of its sufficiency. The question here is whether a sufficient notice of appeal from the judgment was given, within the meaning of this rule.

[3-5] This rule requires the filing of a notice containing the statement, in substance, that the appellant appeals from some specific thing. It is simple and easily complied with and, reasonably construed, it seems to refer to and require that the notice affirmatively state, in some form, a present intention to appeal from a designated judgment or order. While the notice of appeal complied with this rule, with respect to the nonappealable matters, it made no mention of the judgment which had been entered more than two months previously. The notice to prepare a transcript made no attempt to comply with this rule, and discloses on its face that it was not intended for that purpose, and not intended as giving notice of a present intention to appeal from the judgment or from anything else. The statement that a notice of appeal from the judgment had been "heretofore filed" was merely incidental to a request for a record. It could have reference only to what had been otherwise done and not to what was then being done, and it does not state, in substance or otherwise, that an appeal was being taken by means of that notice from the judgment or from anything else. This notice in no way indicates that it was intended in itself to express or disclose an intention of taking an appeal from the judgment. Wall v. Hunter, supra. That it was not intended as a notice of a different appeal, in addition to the one "heretofore filed" is further indicated by the fact that it included no request that the judgment be included in the transcript. Instead of indicating in any way that this notice was also intended as a notice of appeal from the judgment, it clearly states that such a notice of appeal had been "heretofore filed."

While the notice required by Rule 1(a) is to be liberally construed in order to carry out the purpose of the rule, the rule itself requires a statement showing, at least in substance, that an appeal is being taken by or through the means of that notice. The clear meaning seems to be that the notice of appeal provided for shall substantially state a present intention, and shall show that the party is, by means of that notice, presently appealing from some specified thing. The notice to prepare transcripts was clearly not intended as a compliance with this rule. In the face of its language and expressed purpose it should not be construed into an additional and new notice of appeal. An unexpressed intention or desire to appeal from the judgment should not be read into that notice under the guise of a liberal construction. The most that can be said concerning this notice, respecting an appeal from the judgment, is that the one who prepared it thought he had theretofore appealed from the judgment by appealing from the verdict. In our opinion, it would open the door to all manner of abuses to hold that a substantial compliance with this rule here appears, insofar as an appeal from the judgment is concerned.

The several appeals here attempted are dismissed.

114 Cal.App.2d 248

AXELL v. AXELL.

No. 15268.

District Court of Appeal, First District, Division 1, California.

Nov. 18, 1952.

Rehearing Denied Dec. 18, 1952.

Hearing Denied Jan. 15, 1953.

Divorced wife's contempt proceedings against divorced husband for alleged failure to comply with interlocutory and final divorce decrees entitling wife to certain percentage of husband's net profits in excess of $4800 net per annum. From an order of the Superior Court, City & County of San Francisco, Preston Devine, J., both parties appealed. The District Court of Appeal, Bray, J., held, inter alia, that the husband was entitled to deduct income taxes and support liability from his statement of assets and business before determining his net profits.

Affirmed in part and reversed in part with instructions.

1. Husband and Wife 🔑279(1)

Under property settlement agreement, embodied in divorce decrees, providing that husband should pay wife 25% of any and all net profits in excess of $4800 net per annum, in addition to payments to be made monthly to wife and to or for their minor son, in determining net profits, husband was entitled to deduct income taxes and support liability from statement of assets and business.

2. Divorce 🔑269(9)

Divorced wife, who was entitled under terms of divorce decrees to certain percentage of divorced husband's net profits after deduction of income taxes, was not barred by laches from claiming that income tax payments were excessive, though such claim was not asserted until after time within which husband could obtain tax refund.

3. Divorce 🔑243

In determining amount due divorced wife under divorce decrees entitling her to certain percentage of divorced husband's net profits after payment of income taxes, husband was not entitled to reduction from gross receipts of amount actually paid for income taxes, in view of fact that husband and his subsequent wife split the total of their individual incomes for tax purposes, but was entitled to deduct only the amount of income tax which he would have paid had he not added to his income any portion of his subsequent wife's income.

4. Appeal and Error 🔑996, 1010(1)

Where evidence, or reasonable inferences therefrom, supports finding of trial court, court of appeal is bound by such finding.

5. Gifts 🔑49(5)

Evidence supported trial court's finding that amounts given to and expended for divorced wife in addition to that required by divorce decrees were gifts.

6. Interest 🔑39(3)

In view of fact that property settlement agreement providing that wife was to receive a certain percentage of husband's net profits in excess of $4800 net per annum provided no measure for determining what items were deductible from gross income to arrive at net profits, amounts due wife thereunder were unliquidated, and therefore interest would run only from date of judgment determining amount due thereunder. Civil Code §§ 3287, 3302.

7. Divorce 🔑269(13)

Where parties to contempt proceedings for husband's failure to abide by terms of property settlement agreement embodied in divorce decrees stipulated that proceeding was essentially one for an accounting and that order should be one finding amount due rather than usual contempt order, order construing agreement and decrees to arrive at amount due wife thereunder was not void as being in modification of the decrees.

◆

John Barton O'Brien, San Francisco (Herbert Chamberlin, San Francisco, of counsel), for plaintiff-appellant.

Hilary H. Crawford, Hilary H. Crawford, Jr., San Francisco, for defendant-appellant.

BRAY, Justice.

Plaintiff brought contempt proceedings against defendant for alleged failure to comply with the provisions of an interlocutory divorce entered in 1940, and a final decree entered in 1941. While cross-appeals were filed from the whole of the court's "Order Fixing Amount of Moneys Payable by Defendant Under Property Settlement Agreement and Decrees of Divorce," each party is questioning only certain portions of the order.

Questions Presented.

1. The interpretation of the property settlement agreement and the decrees based thereon, particularly the meaning of "net profits" and whether income tax and agreed payments to plaintiff are deductible from gross receipts. 2. Is plaintiff barred by laches from claiming that income tax payments were excessive? 3. The character of certain payments to plaintiff claimed as "offsets" which the court found to be "gifts." 4. Is interest allowable?

Facts.

The interlocutory decree of divorce granted plaintiff a divorce on the ground of cruelty, approved the property settlement agreement, and specifically ordered defendant to comply with its terms. (The final decree follows the terms of the interlocutory decree.) The terms important here follow: 1. Defendant was required to pay plaintiff for her support $100 per month and $25 per month for the support of their child. Defendant at all times has made these payments. In fact, after the child reached majority defendant continued the monthly $25 for almost one and a half years—an overpayment of $425. 2. Defendant was to pay all interest, taxes and insurance on the home occupied by plaintiff until the present encumbrance was liquidated and thereafter and until plaintiff remarries, taxes and insurance only. Defendant met this requirement. 3. This is the crux of the appeals. Defendant, on January 15 in each year, *"in addition* to the payments to be made monthly to Wife, and *in addition* to the payments"[1] for the son, is required to furnish plaintiff a complete financial statement *"of all his assets and businesses"* and shall "pay to said Wife 25% of any and all *net profits* in excess of $4,800.00 net * * *." Defendant did not comply with any of these requirements. Although there were oral demands for a statement, plaintiff first made written demand in December, 1948. Defendant furnished no statement until thereafter. Defendant testified that this 25 per cent provision was intended to apply only to money that both had invested in a "seat adjuster" and from which they expected to make a lot of money. Plaintiff testified that there was no such understanding. (The court, in effect, found that "all his assets and businesses" meant more than the seat adjuster business.) In 1944 the money invested in that venture was lost. In August, 1941, defendant remarried. His new wife, Margaret, is an accountant and during the marriage received a substantial income from her work as such and from other property she owns. Defendant entered into an agreement with Margaret that all her earnings should be her separate property. Prior to and at the time of the divorce, defendant was in the wholesale florist business. In January, 1942, Margaret went into partnership with defendant in that business, contributing $2500 of her separate funds. In 1945 the business was taken over by a new partnership consisting of defendant's brother, who owned a half interest, defendant and Margaret, each owning a quarter. To this partnership Margaret contributed $7500 of her separate funds, the brother $15,000, and defendant $7500. The latter was money received by defendant from the business during 1944. Apparently the share of defendant and Margaret in the operating profits of the florist business has increased to 33 per cent each. In making income tax returns for 1943–47 (the court restricted the evidence to the period ending December 31, 1948), Margaret and defendant filed separate tax returns, each reporting one-half their combined incomes. In 1948 they filed joint returns. The result of splitting their joint incomes was that defendant's "net income" as shown on the returns was greater than his "net profits" from the business.

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[1] All italics added unless otherwise noted.

In determining "net profits" under the agreement and decrees the court took defendant's gross income from the business and deducted therefrom the federal and state income taxes paid by him. Plaintiff's appeal is based on her contention that this deduction was error. In any event, contends plaintiff, the amount deducted was too high. By adding together defendant's income which was only from the florist business and Margaret's income which from that business was equal in amount to that of defendant, and her separate income and splitting the total in half, defendant was paying more tax than he would have paid had the tax been based solely on his income. In reaching the amount of which plaintiff is to receive 25 per cent, plaintiff's share is reduced improperly by deducting this larger sum from defendant's true income. In effect, says she, she is paying a portion of Margaret's income taxes. The court found that by failing to assert her rights until it was too late for defendant to be able to obtain a tax refund by filing returns limited to his actual income, plaintiff was guilty of laches and cannot now contest the method of computing his income tax adopted by defendant for the years in question.

Defendant's appeal is based on his contention that in arriving at his net profits, in addition to reduction for income tax he is entitled to have deducted the amounts paid plaintiff for alimony and child support, and certain sums hereafter discussed which the court found were gifts to plaintiff.

1. Interpretation of Agreement.

[1] The agreement first states that defendant is annually to provide plaintiff with a statement of his "assets and businesses." It then provides that he is to pay her "25% of any and all net profits in excess of $4,800.00 *net* per annum, in addition to the payments to be made monthly to Wife, and in addition to the payments to be made to or for said minor son." A reasonable interpretation of the agreement is that he was to pay 25 per cent of the net profits (over $4,800) as shown on the statement of his *assets and businesses* (subject, of course, to a true statement being made). In construing the provision, the situation of the parties at the time of making the agreement must be considered. They owned a seat adjuster patent that both thought was going to make a lot of money. Had it done so, and had the agreement meant that defendant could not deduct income taxes to arrive at his net profits, defendant's share of his income, after paying plaintiff her 25 per cent, would be almost wholly eaten up by income taxes. The result then would be that plaintiff's 25 per cent share would be much greater than defendant's 75 per cent share. Surely no such result could have been intended by the parties. Again at the time of the execution of the agreement, payments to the wife by way of alimony or property division were not subject to deduction by the husband, and therefore income tax on her share was payable by the husband. It could not have been contemplated that defendant was to pay plaintiff 25 per cent of the amounts he paid on her income tax. The provision that the monthly payments for wife and son are to be in addition to her percentage of the net profits, coupled with the requirement that before she receives any of the net profits he is to receive $4,800 *net*, indicates that it was contemplated that the division of his income would be approximately 1 part to the wife and child and 3

parts to defendant. Thus, the wife was to get $1200 for herself and the husband was entitled to $4,800 net to him, before she would be entitled to anything more. Also plaintiff was to receive interest, insurance and taxes on the home. The ratio between these figures is approximately 1 to 3. After this ratio was met the same ratio would apply to the net profits over the $4,800 net to defendant, 25 per cent to plaintiff, 75 per cent to defendant—again 1 to 3. Having in mind that the agreement was drawn by the attorney who represented plaintiff in the divorce, and therefore must be construed most strongly against her, there can be no other meaning ascribed to the phrase "$4,800 *net*." There must have been some reason for adding the *net* there. Were income taxes and the alimony not to be deducted from gross income the above-mentioned ratio would be badly disturbed. For example, if defendant's net income before taxes and payments to and for plaintiff only were considered in arriving at plaintiff's share, and if that net income for a particular year was only $6,000, defendant would be required to pay plaintiff 25 per cent of $1,200 ($6,000 minus $4,800) or $300. Thus plaintiff's receipts would total $1,500. Defendant, however, would receive only $5,700 out of which he would have paid plaintiff $1200 (he was required to pay plaintiff the $1200 in any event, regardless of the amount of his income) which would have left him but $4,200 out of which he would still have to pay income taxes on $6,000. He also would have to pay plaintiff $300 for the child, plus insurance, etc., on the home. What then becomes of the provision that he is to have $4,800 *net* before he has to make any payments in addition to support? *Net* profits in excess of $4,800 *net* could only mean that from his statement of assets and businesses there is to be a deduction of both income taxes and support liability before determining such net profits. A true annual statement of defendant's assets and businesses would necessarily include a statement of such fixed liabilities as income taxes and support moneys. The words in the agreement providing that the 25 per cent payment to plaintiff of net profits is to be "in addition to" the support payments, do not in anywise affect the method of determining what are the net profits. Those words apply to the requirement that regardless of his net income defendant is to pay plaintiff the agreed support, and then in addition a portion of the net profits if there are any over and above $4,800 *net* to defendant.

Definitions of "net profits" in a business such as are set forth in the cases cited by plaintiff, Boradori v. Peterson, 86 Cal.App. 753, 261 P. 520, Nelson v. Abraham, 29 Cal.2d 745, 177 P.2d 931, Swerdfeger v. United Acceptance Corp., 9 Cal.App.2d 590, 50 P.2d 818, are not in point here. What are "net profits" depends greatly upon the circumstances of a particular case. Even accountant's definitions of the phrase are not necessarily applicable. What the parties clearly had in mind was not a technical definition but the net amount left after plaintiff had been paid taxes and interest on the home, the agreed support for herself and child (for herself alone after the child's minority should terminate), and after defendant had received his $4,800.

2. Laches.

[2, 3] As before stated, the court found that because defendant could not obtain a tax refund from the government, plaintiff was guilty of laches in not asserting her claim earlier and could not now contest defendant's method of computing the taxes. We fail to find any support in the evidence for this finding. The method evolved by defendant and Margaret was one which reduced the total amount of taxes payable by both. Plaintiff had nothing to do with the establishment of this method. While defendant did not deduct from his income tax base the payments to plaintiff which he is now required to make under the 25 per cent clause, that fault was his. He deliberately failed and refused to perform his agreement. It was not until 1945 that his income was sufficient to require any percentage payment to plaintiff. He testified that "probably two or three years after," in 1945 or 1946,

plaintiff asked for a statement. Plaintiff testified that she asked defendant for a statement year after year commencing the second year after the divorce and he would reply that "he didn't have the money" and "not to worry about it." She testified that she believed him. In view of the friendly relationship between the parties, her failure to assert her rights legally can hardly be held the cause of his failure to change his system of income tax returns. Nor in determining the amount of income tax reduction to be allowed in arriving at the percentage of the net profits to be awarded plaintiff is the trial court to permit a reduction from gross receipts of the amount *actually* paid by defendant to the government. The amount deductible is the amount of income tax which defendant would have paid, had he not added to his income any portion of Margaret's income.

3. Gifts.

[4, 5] In spite of the divorce and defendant's remarriage, the parties have remained friendly. In 1947 at plaintiff's request defendant expended $225 for painting portions of the house. Plaintiff testified defendant did this for the son at plaintiff's request. He also paid plaintiff $100 to build an additional room for the son. The agreement and decrees provided for payment of insurance only on the house. Defendant paid $127.79 in premiums for insurance on the furniture. In 1945, plaintiff received $150 from defendant for a trip to Minnesota. Defendant paid a total of $614.68 as premiums on insurance on plaintiff's car. Plaintiff testified that defendant paid them without asking her to do it, because the son used the car most of the time. In 1940 defendant bought plaintiff a Ford for $1,300. Later the car was sold, and defendant bought plaintiff a Pontiac, by adding $550 of his own money to that received from selling the Ford. Plaintiff testified that defendant had promised to buy her a car when they were divorced, and that she did not ask him to buy the cars. It was stipulated that for "his son and former wife" defendant bought tires costing $200. 1943 through 1947 defendant paid plaintiff's income taxes levied on her $100 per month alimony, totalling $728.18. December 11, 1947, plaintiff received $150 from defendant. It was "something extra." The total of these amounts plus the overpayment of support after the son's majority (he was then in the Navy) totalled $5,500.05. The court refused to allow them as "offsets" and found that they were gifts from defendant to plaintiff. Having in mind the well known rule that if the evidence, or the reasonable inferences therefrom, support a finding, we are bound by it, we cannot say that the finding is erroneous. The defendant at no time testified that in making these payments he regarded them as payments on account nor did he testify that they were *not* gifts. He did not deny plaintiff's testimony as to the reasons the payments were made. Defendant at all times contended that the 25 per cent of the net profits he was to pay plaintiff referred only to the "seat adjuster" business. There were no profits from that venture. Moreover, the venture ended in 1944. Thus the payments could not have been made by defendant as offsets. Defendant contends that under the circumstances of this case there is no presumption of gift. Our case is unusual in the very friendly feeling that exists between the divorced parties. The circumstances of this case including the uncontradicted testimony of plaintiff are sufficient to justify the finding of gift.

4. Interest.

[6] No attack is made on the correctness of the court's finding as to the yearly net profits other than as it is affected by the questions herein discussed. The court found that defendant owed plaintiff nothing for the years preceding 1945. For that year it found $2,729.36 due, for 1946, $1,389.87, for 1947, $1,455.18, for 1948, $374.03, a total of $5,948.44. It awarded 7 per cent interest on the amount found due each year, starting the interest from January 15 in that year, and allowing interest only to January 15, 1950.

Defendant contends that no interest at all should be permitted as the indebtedness was unliquidated until the court made its determination and hence interest should run only from judgment. Defendant points out that in any event, the allowance of interest from January 15 of the year in which the indebtedness occurred, is erroneous. Obviously, until the year was over the net profits of that year could not be determined. Plaintiff concedes this error but contends it is more than offset by the fact that the court stopped the interest on January 15, 1950, instead of allowing it to continue until judgment.

"The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." Civ. Code, § 3302. "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *." Civ.Code § 3287. Lineman v. Schmid, 32 Cal.2d 204, 195 P.2d 408, 4 A.L.R.2d 1380, traces the history of the application of section 3287 in determining when interest is allowable for breach of contract, reviews many cases on the subject, and approves the rule as stated in Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, saying: "In that case liquidated damages were defined as those which were certain by computation from the face of the contract, or which might be made certain by reference to well-established market values plus computation. If damages were not susceptible of ascertainment, either by computation from the contract or from established market rates, interest was not allowable until the amount due had been determined by judicial process." 32 Cal.2d at pages 209–210, 195 P.2d at page 411. The court quoted the rule as stated in Restatement of the Law of Contracts, section 337 (a), which rule is practically the same as that set forth in the Cox case. Our problem, then, is to determine whether the amounts payable to plaintiff were certain by computation from the face of the contract or whether they had to be determined by judicial process. Plaintiff was to receive a proportion of the net profits. The contract provides no measure for determining what items were deductible from the gross income to arrive at the net profits. In view of the uncertainty of that factor which required determination by the judicial process it must be held that the amounts due plaintiff were unliquidated, in the sense that they could not be determined until a court clarified the uncertainty in the contract. Therefore, as the claims were unliquidated, interest would run only from judgment.

Form of Order.

[7] In her closing brief plaintiff contends that the court in this contempt proceeding in effect modified the interlocutory and final decrees which it had no power to do. The order does not have that effect. In arriving at the question of whether defendant had complied with those decrees it became necessary for the court to construe them and the agreement upon which they are based. This the court did. It was stipulated at the hearing that the proceeding was essentially one for an accounting and that the order should be one finding the amount due rather than the usual contempt order.

The order is affirmed as to the provision finding that the sums totalling $5,500.05 were gifts and disallowing them as offsets. In all other respects the order is reversed with instructions to the trial court to take additional evidence and make new findings and order as herein set forth. Plaintiff is awarded costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

39 Cal.2d 839

CITY OF VERNON et al. v. SUPERIOR COURT OF STATE IN AND FOR LOS ANGELES COUNTY.

L. A. 22310.

Supreme Court of California, in Bank.

Nov. 21, 1952.

Rehearing Denied Dec. 18, 1952.

Proceeding to review an order of the Los Angeles Superior Court which denied a motion to remit previously ordered punishment for contempt of court committed by councilmen of a municipality. The Supreme Court, Schauer, J., held that trial court abused discretion in refusing to remit punishment.

Order modified.

1. Municipal Corporations 🔑846

Where Superior Court found that municipalities created a nuisance in discharging sewage into a Bay through sewage system of one municipality, and ordered such municipalities to arrange for payment to such municipality their respective shares of cost of a new disposal plant to be built by such municipality, councilmen of one of such municipalities had a right to pursue in good faith every legal remedy apparently available to them.

2. Injunction 🔑232

Where councilmen of municipality were found to be in contempt of court for failure to comply with mandatory injunction, and councilmen subsequently complied, and failure to comply within time limited was result of action of councilmen in pursuing in good faith what they were advised by counsel and believed were legal remedies available to councilmen and to their municipality, trial court abused discretion in refusing to remit punishment of such councilmen on their motion.

Carson B. Hubbard, City Atty., Huntington Park, Edward R. Young, John F. O'Hara and John W. Shenk, III, Los Angeles, for petitioners.

Edmund G. Brown, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

This is a proceeding to review an order of the Los Angeles superior court which denied a motion to remit previously ordered punishment for contempt of that court. We have concluded that the punishment should be remitted.

In a suit by the State of California against municipal corporations which discharged their sewage through the Los Angeles sewage system into Santa Monica Bay, thus creating a nuisance, it was ordered, in material part, that the corporations and their officers "arrange" for payment to Los Angeles of the respective corporations' shares of the cost of a new disposal plant to be built by Los Angeles. (People v. City of Los Angeles (1948), 83 Cal.App.2d 627, 189 P.2d 489; hearing denied; certiorari denied, Culver City v. People, 335 U.S. 852, 69 S.Ct. 80.) The city of Vernon and its then councilmen, petitioners in this proceeding, did not within the time limited comply with the mandatory injunction; instead they continued, under the advice of their counsel, to seek by legal procedures to avoid compliance with the injunction. The trial court ordered that each of them pay a fine; that the councilmen be confined in the county jail for five days; and that they further be confined in jail until they arranged the ordered financing.

The cities and their councilmen sought review of the contempt orders. We affirmed the orders, but said, "The conduct of the petitioning councilmen which was found contemptuous was not the conduct of private individuals but that of public officials protecting the interests of the municipality which they were elected to serve, acting under the advice of counsel; and since the making of the contempt order they have fully complied with the requirements of the injunction. The argument is made on behalf of petitioners that by reason of those facts the punishment of the individual petitioners by fine and imprisonment is so extreme as to be beyond the range of proper judicial discretion. Such argument, however, is not a proper one to address to this court at this time. It includes facts not all of which were before the trial court at the time of the proceedings under review. Our power on review on the present record is limited, by section 1074 of the Code of Civil Procedure, to a determination 'whether the inferior tribunal * * * has regularly pursued the authority of such tribunal,' and the reasonableness of the punishment cannot be passed upon in these review proceedings [citation]. The trial court, however, * * may remit the unexecuted provision of the judgment that petitioners personally be punished for contempt. The argument based on the mitigating circumstances above mentioned may in all propriety be addressed to that court, and it is to be presumed that it will take into consideration such mitigating circumstances and make an order appropriate in the premises." (City of Vernon v. Superior Court (1952), 38 Cal.2d 509, 519–520, 241 P.2d 243; see also Leonis v. Superior Court (1952), 38 Cal.2d 527, 241 P.2d 253; City of Culver City v. Superior Court (1952), 38 Cal.2d 535, 241 P.2d 258.)

Petitioners moved the trial court for an order remitting the contempt judgments and sentences. Testimony, stipulations, and argument as to the above mentioned mitigating circumstances were presented. As to its previous orders that the individual petitioners be imprisoned until they complied with certain provisions of the injunction in People v. City of Los Angeles (1948), supra, 83 Cal.App.2d 627, 189 P.2d 489, it was unquestioned, and the trial court necessarily determined, that those provisions of the injunction had been complied with by such petitioners without their imprisonment and it ordered that that portion of the commitments be not enforced. But notwithstanding the circumstances it refused to remit the portions of the commitments which provided for fine and imprisonment as punishment, and the present proceeding followed. It is, of course, a new proceeding upon a new record.

The trial court based its refusal to remit the punishment upon the following view: "[P]ractically nothing was done by these particular contemnors prior to the time that they were found guilty of contempt and sentenced. * * * It has been urged that they were doing their duty to their cities and they were willing to do whatever was necessary, but the fact remains that if they did so state it was merely lip service and, as a matter of fact, they did practically nothing. * * * I failed to hear them urge anything in mitigation that has been done by the parties * * * except that which they were finally compelled to do, and nothing more than should have been done long years before. * * * [At the hearing on the motions to remit, there was] practically nothing brought to the attention of the Court that had not been brought to its attention at the time it found the contemnors guilty and sentenced them for contempt. If the Court had granted the motions in toto it would have been in substance a notice to City Councilmen that they could fail to comply with a court's order in a matter of this character and probably escape punishment, even though they permitted years to elapse from the time of the original judgment, and a long period of time to elapse after the contempt order and sentence. * * * They cannot hide back of the skirts of their attorneys."

Petitioners take issue with the quoted statement of the trial court substantially in its entirety and urge that their contempt, if any, was not, as the trial court indicated, flagrant and deliberate. They contend that under section 1075 of the Code of Civil Procedure this court in the instant proceeding may remit the portions of the commitments which impose punishment. That section provides in material part that, after hearing on petition for writ of review, the court may "give judgment, either affirming or annulling, or modifying the proceedings below."

The attorney general contends that this court is without jurisdiction to review the reasonableness of the order denying the motion to remit punishment. He urges that our power is limited by the rule that, in reviewing an order which imposes punishment for contempt, we cannot inquire into the reasonableness of punishment which is within statutorily authorized limits. (See Ex parte Ah Men (1888), 77 Cal. 198, 203, 19 P. 380; Seventy-Six Land & Water Co. v. Superior Court (1892), 93 Cal. 139, 143, 28 P. 813; Crocker v. Conrey (1903), 140 Cal. 213, 218, 73 P. 1006; People v. Latimer (1911), 160 Cal. 716, 720, 117 P. 1051; Lindsley v. Superior Court (1926), 76 Cal. App. 419, 433–434, 245 P. 212; In re Carboni (1941), 46 Cal.App.2d 605, 614, 116 P. 2d 453.) However, as previously stated, this is not such a proceeding.

[1] The then councilmen of the city, when they refrained from obeying the mandatory injunction, were acting as public officials, pursuant to advice of counsel, in performance of what they believed to be their duty to the city. The basic question whether they were violating the injunction was still in dispute until our decisions in the Vernon, Leonis, and Culver City cases, supra. Until those decisions were rendered petitioners could not know that independent litigation instituted by them against the city of Los Angeles was not sufficient compliance with the injunction in People v. City of Los Angeles, supra. Petitioners not only had a right to pursue (of course, only in good faith) every legal remedy apparently available to them but, as public officers, charged with the administration of a trust, they may well have felt bound to pursue the remedies unto which counsel advised them.

[2] The fact that there was disagreement among the members of this court as to whether petitioners had made the "arrangements" required by the mandatory injunction (see opinions of Justice Edmonds dissenting in part and concurring in part in the Vernon, Leonis, and Culver City cases, pages 520, 532, and 542 of 38 Cal.2d, pages 249, 256 and 262 of 241 P.2d, see also dissents of Justice Carter, pages 522, 532, and 542 of 38 Cal.2d, pages 250, 256 and 262 of 241 P.2d) indicates that petitioners were not frivolously flouting the commands of the superior court, and the fact that petitioners immediately completed, and apparently must have previously prepared to make, those "arrangements" when this court decided that they were in contempt seems to conclusively confirm their lack of deliberately contemptuous conduct. The trial court in the present proceeding has, in effect, quite obviously determined that it is not necessary to punish petitioners in order to secure performance of the injunction, for it has determined that they have performed. The punishment which is left, then (which is the maximum for any contempt) is for pursuing in good faith what they were advised by counsel and believed were legal remedies available to the councilmen and to the city which they represented. In these circumstances we are of the opinion "that it was a manifest abuse of discretion of the trial court to refuse to remit the punishment of the individual petitioners and the municipal corporation which could act only through the individual petitioners."

The attorney general urges that the trial court is without jurisdiction to remit the punishment of petitioner John B. Leonis because he was actually committed to jail and remained there for a short time. In support of this contention the attorney general cites Barry v. Superior Court (1891), 91 Cal. 486, 488, 27 P. 763, and People v. McAllister (1940), 15 Cal.2d 519, 526, 102 P. 2d 1072 (See also In re Barry (1892), 94 Cal. 562, 29 P. 1109; In re Moore (1928), 93 Cal.App. 488, 490, 269 P. 664.) These cases are not controlling here. The McAllister case affirmed an order denying a motion to modify a final judgment of conviction of crime. The Barry and Moore cases do not concern remission of punishment but, rather, take the position that a trial court, after it has issued one commitment in a contempt proceeding, is without power to issue a second and different commitment therein for the same contempt.

For the reasons above stated, the order under review is modified to remit the previously ordered punishment.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., and McCOMB, Justice pro tem., concur.

SHENK, J., being disqualified, did not participate.

CARTER, Justice.

I concur in the result; that is, that all punishment imposed by the contempt judgment be remitted. But I do not agree with the reasoning upon which the conclusion is based.

This court having concluded that the injunction in this case was sufficiently certain to justify an adjudication for contempt, City of Vernon v. Superior Court, 38 Cal.2d 509, 241 P.2d 243, and thus affirmed that adjudication, now tortures the law by saying that the trial court abused its discretion in refusing to vacate and remit the punishment imposed for the contempt. That is to say: This court held in the prior proceeding that the judgment of contempt was proper but in this proceeding it holds that although proper, *no punishment should be imposed for the contempt*; that although there was no justification for the contemptuous conduct of petitioners which resulted in the contempt judgment, no punishment for that contempt can be imposed as a matter of law. I concur in the result reached here because it is the same as reached in my dissent in the former proceeding on the ground that the contempt judgment was not proper. Assuming, however, that the majority was correct in its former decision in this case, it is not possible now to achieve the result here reached without ignoring settled rules of law.

Hence, assuming that the injunction was sufficiently certain to justify the judgment of contempt, the following appears. In the former case the trial court rendered judgment finding the councilmen guilty of contempt. That judgment was affirmed by this court holding, in addition to finding the injunction certain, that it was immaterial that there was no finding that the councilmen intended to violate the injunction; that it was enough if they knew of the injunction and were able to obey it but did not do so; that from those circumstances the trial court could infer that their inaction was intentional; that it is no justification for the violation of the injunction that it was done on advice of counsel; that the affirmance of the injunction judgment by the District Court of Appeal, People v. City of Los Angeles, 83 Cal.App.2d 627, 189 P.2d 489, "conclusively" established that the bringing of actions on the old contracts was not in compliance with the injunction; and finally, that the issue of the nature of the punishment imposed could not be reviewed on a review of the judgment of contempt, but a motion to remit the punishment could be made in the trial court, the payment of the fines and serving the jail sentences having been stayed by this court pending the review of the contempt judgment.

The motion for remission of the punishment was made in the trial court and was denied. Now this court holds on a review of the denial by certiorari (which tests jurisdiction only) that the trial court abused its discretion in refusing to vacate and remit the punishment; that it had no basis for refusing to vacate or remit the punishment imposed for acts which had been committed in the past. On the identical facts which were held *not* to affect adversely the contempt judgment in the former proceeding, that is, advice of counsel, commencing actions on the old contracts as a purported compliance with the injunction, lack of specific intent to violate the injunction, etc., this court now holds that the entire punishment for the contempt judgment must be vacated or "remitted". That startling conclusion is reached and the authorities are brushed aside by the empty device of saying that this is a different proceeding. It may be, but the same issues are present here. If the councilmen are in contempt (and this court so held in the prior proceeding) there is no basis whatsoever for saying that the trial court cannot punish them at all for that contempt. Indeed the authorities are all to the contrary.

The rule is thus stated: "The petitioner not having had imposed upon him a fine for any of the contempts of which he has been adjudged guilty in excess of the amount authorized to be imposed by the provisions of the Code of Civil Procedure, [sec. 1218] under which this action was taken and had, *this court is not authorized to hold the aggregate amount thereof excessive, whatever our views might be upon this matter.*" Lindsley v. Superior Court, 76 Cal.App. 419, 433, 245 P. 212, 218; In re Carboni, 46 Cal.App.2d 605, 116 P.2d 453; In re Friday, 138 Cal.App. 660, 32 P.2d 1117; 76 Land & Water Co. v. Superior Court, 93 Cal. 139, 28 P. 813; People v. Latimer, 160 Cal. 716, 117 P. 1051. As Mr. Justice Spence states in Donovan v. Superior Court, Cal., 250 P.2d 246, where a fine of $500 was imposed for contempt and it was claimed on certiorari that it was excessive: "The trial court, therefore, had jurisdiction to impose a fine not exceeding $500 [within the limits of section 1218 Code of Civ.Proc.] for each contemptuous act of each petitioner, and, as the court *did not impose a fine in excess of that amount for any such act, we cannot hold the aggregate amount of the fines imposed upon petitioners to be excessive.* Lindsley v. Superior Court, supra, 76 Cal. App. 419, 433–434, 245 P. 212." The basic premise of the decisions in all of the cases is that under the statute: "The judgment and orders of the court, judge, or justice, made in cases of contempt, are final and conclusive", (Code of Civ.Proc. sec. 1222) and the only thing reachable on review of contempt orders are jurisdictional questions. Meyberg v. Superior Court, 19 Cal. 2d 336, 121 P.2d 685. The court here cannot be said to have exceeded its jurisdiction because it has the express authority under section 1218 of the Code of Civil Procedure to impose fines up to $500 and imprisonments up to five days. In fact its discretion fixing the punishment cannot be reviewed on certiorari. Fredrickson v. Superior Court, 38 Cal.2d 593, 241 P.2d 541; Estate of Kay, 30 Cal.2d 215, 181 P.2d 1.

These principles cannot be escaped, as the majority attempts, by saying that this is a different case, that is, it involves a denial of a motion to remit punishment rather than a judgment of contempt, because by its language section 1222 of the Code of Civil Procedure, supra, states that the judgment *and* the orders made in cases of contempt, are final. *Thus* certainly an order denying a motion for remission of punishment imposed for contempt is an order made in a contempt case, and is final, and it is reviewed here by certiorari which goes to jurisdictional questions. If that is not true then the order of denial would not be reviewable on certiorari because it would not be final under section 1222; it could be reviewed only on appeal as a special order made after final judgment (the contempt judgment). Code of Civ.Proc. Sec. 963.

The majority opinion holds "that it was a manifest abuse of discretion of the trial court to refuse to remit the punishment of the individual petitioners and the municipal corporation which could act only through the individual petitioners." From the foregoing statement, we are justified in assuming that it is the view of the majority that the trial court had at least some discretion in determining what if any portion of the punishment should be remitted. In other words the trial court might have remitted $100 of the fine and one day in jail or $400 of the fine and 4 days in jail for each petitioner. If such had been the order of the trial court, would this court hold in either instance that there had been an abuse of discretion? If so, then the trial court had no discretion to do anything other than remit all of the punishment. What the trial court did then was not to abuse its discretion but simply failed to predict what this court thought it should do. Obviously, if the trial court had any discretion to exercise, it was not abused if it acted within the limits prescribed by the statute. See Donovan v. Superior Court, supra. Otherwise the statute is meaningless and this court can nullify every contempt judgment even though clearly within the jurisdiction of the trial court to pronounce. Such is the effect of the majority holding in this case. As stated above, it is contrary to express statutory provision and all the authorities. But I concur in the result, because petitioners were not guilty of contempt, and should not, therefore, have been subjected to any punishment whatsoever.

39 Cal.2d 891

CITY OF CULVER CITY, a municipal corporation, Arthur G. Segrell, Thomas J. Carroll, Curtis J. Davis, William G. Douglas and J. Ray Klots, as former or present members of the City Council of the City of Culver City, petitioners, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent.

L. A. 22311.

Supreme Court of California, in Bank.

Nov. 21, 1952.

Rehearing Denied Dec. 18, 1952.

M. Tellefson, City Atty., Culver City, and E. L. Searle, Los Angeles, for petitioners.

Edmund G. Brown, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

PER CURIAM.

For the reasons stated in our opinion in City of Vernon v. Superior Court, 250 P. 2d 241, the superior court order under review is modified to remit the previously ordered punishment.

CARTER, Justice.

I concur in the conclusion reached for the same reasons as stated in my concurring opinion in City of Vernon v. Superior Court, 250 P.2d 241.

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39 Cal.2d 848

DONOVAN et al. v. SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY et al.

L. A. 21859.

Supreme Court of California, in Bank.

Nov. 21, 1952.

Petition for annulment of a judgment of contempt for violation of permanent injunction. The Supreme Court, Spence, J., held that each petitioner could be fined for each violation in amount of $500.

Judgment affirmed.

1. Injunction 🔑231

On petition for annulment of a judgment of contempt for violation of permanent injunction, plea of res judicata did not present for review a question of jurisdiction of trial court to render judgment of contempt. Code Civ.Proc. §§ 1068, 1074.

2. Injunction 🔑231

Where petitioners for annulment of a judgment of contempt for violation of permanent injunction did not plead res judicata in trial court, they could not make such contention for first time in their petition to Supreme Court.

3. Contempt 🔑67

Where petitioners made general appearances in contempt proceedings, and petitioners filed answering affidavits containing various contentions in addition to their objections to service, and petitioners moved to disqualify trial judge, petitioners could not question jurisdiction of trial court over their persons on petition to Supreme Court for annulment of judgment of contempt. Code Civ.Proc. § 170.

4. Contempt 🔑54(7)

In contempt proceeding amended affidavit was not required to be served on persons charged with contempt of court where amendment pertained to immaterial matter which did not affect basis for proceeding.

5. Contempt 🔑67

On petition to Supreme Court for annulment of a judgment of contempt for violation of permanent injunction, record did not disclose existence of any irregularity in assignment of judge who heard contempt proceeding. Code Civ.Proc. § 170, subd. 5.

6. Judges 🔑51(1)

Provision of Code of Civil Procedure authorizing transfer of action or proceeding to a judge who is not disqualified when there are two or more judges of same court, one of whom is disqualified, permits transfer of a cause to a qualified judge of same court in any case in which a claim of disqualification may be made against one of the other judges, and operation of such provision is not confined to cases where actual disqualification has been either admitted or determined after a hearing. Code Civ.Proc. § 170, subd. 5.

7. Judges ⚷51(1)

Where another judge, who is not disqualified, is assigned to hear a cause in same department in which it is pending, such assignment is within phrase "transferred to a judge who is not disqualified," within provision of Code of Civil Procedure authorizing transfer of action or proceeding to a judge who is not disqualified when there are two or more judges of same court, one of whom is disqualified, and no actual transfer to another department is required. Code Civ.Proc. § 170, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Transferred To a Judge Who Is Not Disqualified".

8. Contempt ⚷31, 71

Provision of Code of Civil Procedure requiring court to determine upon answer and evidence whether person proceeded against in contempt proceeding is guilty of contempt charged, and authorizing imposition of fine not exceeding $500 if such person is adjudged to be guilty, is constitutional. Code Civ.Proc. § 1218.

9. Contempt ⚷72

Where separate contemptuous acts are committed, contemner can be fined for each offense in amount authorized by Code of Civil Procedure. Code Civ.Proc. § 1218.

10. Injunction ⚷232

Where permanent injunction prohibited petitioners from using, occupying or maintaining certain realty for purpose other than a single-family dwelling, and required removal of several apartments and reconversion of main building into single-family residence, and one petitioner subsequently actively engaged in renting apartments after they were vacated, and other petitioner participated in same contemptuous acts, and on other occasions such other petitioner rented apartments, and no action was taken by such other petitioner as owner toward removal of apartments or reconversion of main structure, as required by injunction, each petitioner could be fined for each offense each committed in amount of $500. Code Civ.Proc. § 1218.

11. Injunction ⚷230(3)

On petition to Supreme Court for annulment of a judgment of contempt for violation of permanent injunction prohibiting petitioner from doing specified acts and requiring petitioner to do other specified acts, petitioner had burden of showing alleged inability to comply with injunction.

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John F. Donovan, in pro. per., and Aileen M. MacLymont, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

SPENCE, Justice.

Petitioners, John F. Donovan and Jeanette G. Donovan, seek the annulment of a judgment of contempt in which they were fined respectively $2,000 and $4,500. They contend that the trial court was without jurisdiction to render the judgment, and that the fines imposed are excessive and constitute "unusual punishment" in violation of the Eighth Amendment to the Federal Constitution and article I, section 6 of the California Constitution. We have concluded that these contentions cannot be sustained and that the judgment must be affirmed.

It was not until August 29, 1952, being long after the commencement of this proceeding, that petitioner John F. Donovan was adjudged to be an incompetent and John F. Cownie was appointed guardian of his person and estate. Upon the filing of a certified copy of the letters of guardianship, an appropriate order of substitution was made by this Court and a joint brief has been filed herein by counsel representing both petitioner Jeanette G. Donovan and petitioner John F. Donovan, appearing by his said guardian.

The contempt proceedings arose out of alleged violations of a permanent injunction issued upon a judgment entered on November 26, 1945. This judgment was affirmed in Donovan v. City of Santa Monica, 88 Cal.App.2d 386, 199 P.2d 51, and is now a final judgment determinative of the rights of the parties. The injunction restrained petitioners from using, occupying or maintaining the real property at 136 Georgina Avenue, Santa Monica, California, for any purpose other than a single-family dwelling. It also required the removal of several apartments and the reconversion of the main building into a single-family residence.

[1, 2] Petitioners contend that the issues involved in the action culminating in the November 26, 1945, judgment were res judicata because they had been settled by a stipulation entered into during a certain criminal trial in the Police Court of Santa Monica in April, 1940. This contention does not appear to be tenable, but the merits of the claim need not be discussed as the plea of res judicata does not present for review a question of jurisdiction under sections 1068 and 1074 of the Code of Civil Procedure. Baird v. Superior Court, 204 Cal. 408, 412, 268 P. 640; Lincoln v. Superior Court, 22 Cal.2d 304, 308, 139 P.2d 13. Furthermore, petitioners cannot make this contention for the first time in their petition in this proceeding. Where there is an opportunity to do so in the trial court, the former judgment must be pleaded in order that it may constitute a bar. Strong v. Owens, 91 Cal.App.2d 336, 339, 205 P.2d 48; Steward v. Paige, 90 Cal.App.2d 820, 825, 203 P.2d 858.

It is next contended that the trial court had no jurisdiction over petitioners in the contempt proceedings because a copy of the "Affidavit of Leslie S. Storrs for Order to Show Cause In Re Contempt of Jeanette G. Donovan and John F. Donovan," as amended in court on July 17, 1950, was not served upon either of them. The trial judge permitted an amendment whereby a reference in the affidavit to "Exhibit A," a copy of Ordinance No. 148 of the City of Santa Monica, was stricken. The amendment was made following petitioners' objections that the affidavit as served upon them did not have "Exhibit A" attached.

[3] Petitioners cannot now question the trial court's jurisdiction over their persons inasmuch as both made general appearances, submitting to that jurisdiction, by filing answering affidavits containing various contentions in addition to the objections to service, and by moving to disqualify the trial judge. See Judson v. Superior Court, 21 Cal.2d 11, 13, 129 P.2d 361. Section 170 of the Code of Civil Procedure limits the right to present disqualification matters to "any party to such action or proceeding *who has appeared therein*". (Emphasis added.)

[4] The trial court had jurisdiction to permit the amendment, and it properly did so. The affidavit pleaded the ordinance elsewhere by referring to its title, number and date of enactment, Code Civ.Proc. § 459, and, in any event, the reference to the exhibit was unnecessary. The amendment pertained to an immaterial matter which did not affect the basis for the proceeding, and it was not necessary to serve the amended affidavit on petitioners. See Drotleff v. Renshaw, 34 Cal.2d 176, 182, 208 P.2d 969.

Petitioners further contend that the Honorable Alfred L. Bartlett, who was the trial judge assigned to hear the contempt proceeding, was without jurisdiction to proceed with said hearing because an affidavit for disqualification of the Honorable Orlando H. Rhodes, another judge of the same court, had been filed and had not been disposed of in the manner prescribed by section 170 of the Code of Civil Procedure. This contention appears to be based on a misconception of the proceedings had in the trial court, which misconception is probably due to petitioners' numerous changes of counsel in these proceedings.

Said section 170 provides in part that "* * * the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties * * *." The record before us reveals that when the contempt proceeding came on for hearing before Judge Rhodes on June 16, 1950, a motion was made "to remove cause for disqualification." Judge Rhodes then granted the motion of petitioner John F. Donovan for a continuance to July 17, 1950. On June 30, 1950, petitioner John F. Donovan filed three motions entitled as follows: (1) "Notice of Motion for disqualification of the Honorable Orlando Rhodes"; (2) "Notice of Motion to remove cause for disqualification of the Honorable Orlando H. Rhodes"; and (3) "Notice of motion to transfer the contempt proceeding from Santa Monica Superior Court, Department A to Los Angeles Superior Court, Department 1." All there motions were noticed for July 7, 1950, but only the second notice of motion made reference to the particular department of the superior court in which the motion would be made, stating "and said motion will be made before the Honorable Clarence Kincaid, Department 1, Hall of Records, Los Angeles, California."

The record further discloses the following minute order made on July 7, 1950, in Department 1, with Judge Kincaid presiding: "Plaintiffs' motion to transfer this case from the Santa Monica Branch of the Superior Court to Los Angeles Superior Court, plaintiffs' motion for disqualification of Honorable Orlando H. Rhodes, and plaintiffs' motion to remove cause for disqualification of Honorable Orlando H. Rhodes come on for hearing; Jeanette G. Donovan and John F. Donovan appearing in propria persona, and Royal Sorensen, City Attorney of the City of Santa Monica, by J. Leroy Irwin, Deputy, appearing as counsel for defendants. Motions (3) are denied. Notice waived." Thereafter, notice of the last mentioned order was served by mail on petitioners on July 11, 1950, and the contempt proceeding was heard by Judge Bartlett on July 17, 1950. New counsel, other than petitioners' present counsel, represented petitioners at said hearing and Mr. Sorensen, the City Attorney, rather than his deputy, represented the City of Santa Monica. Apparently neither counsel nor the trial judge knew of the order made by Judge Kincaid in the disqualification proceeding. However, petitioner John Donovan's challenge to the jurisdiction of Judge Bartlett to proceed with the contempt hearing was overruled upon the ground that the matter of the disqualification of Judge Rhodes was "moot" as Judge Bartlett, rather than Judge Rhodes, had been assigned to hear that proceeding, and that no question was raised concerning the qualification of Judge Bartlett.

[5] Petitioners' claim that Judge Bartlett was without jurisdiction to proceed with the contempt hearing cannot be sustained. First, petitioners cannot now successfully contend that Judge Kincaid was not "some other judge agreed upon by the parties" to hear the proceeding relating to the disqualification of Judge Rhodes when they voluntarily chose to proceed with their motion for disqualification before Judge Kincaid, and the other parties made no objection. Second, even if it be assumed that no disposition had been made of the proceedings relating to the disqualification of Judge Rhodes, it does not appear that there was a lack of jurisdiction on the part of Judge Bartlett to proceed. The record does not disclose that there was any irregularity in the assignment of Judge Bartlett to hear the contempt proceeding. In fact, an affidavit of Judge Bartlett shows that he was duly assigned by Judge Kincaid, the Presiding Judge, to sit in the Santa Monica departments of said court from July 17 to September 1, 1950.

[6, 7] Subdivision 5 of section 170 of the Code of Civil Procedure contains the following proviso: "* * * provided, however, that when there are two or more judges of the same court, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified." This proviso was no doubt intended to provide a simple and expeditious method for the disposition by admittedly qualified judges of cases in which claims of disqualification might be made in courts having two or more judges. We are of the opinion that this proviso should be construed to permit the transfer of a cause to a qualified judge of the same court in any case in which a claim of disqualification may be made against one of the other judges, and that its operation should not be confined to cases where actual disqualification has been either admitted or determined after a hearing. See Stern v. Stern, 83 Cal.App.2d 608, 189 P.2d 536. We are further of the opinion that where another judge, who is not disqualified, is assigned to hear the cause in the same department in which it is pending, such assignment comes within the meaning of the phrase

"transferred to a judge who is not disqualified," and that no actual transfer to another department is required.

We now turn to a consideration of the contention that the fines of $2,000 and $4,500 imposed on petitioners John F. Donovan and Jeanette G. Donovan, respectively, are excessive and constitute "unusual punishment" within the aforementioned constitutional provisions.

Evidence was presented at the contempt hearing disclosing that John Donovan violated the injunction by actively engaging in renting apartments to persons other than members of his own family after the apartments had been vacated by the previous tenants. He was found in contempt and fined $500 for each of four such contemptuous acts.

The record also discloses that Mrs. Donovan participated in the same four contemptuous acts and that she negotiated for the rental of, and did rent, apartments on three other occasions. In addition, no action had been taken by her toward the removal of apartments from the main structure or the garage, or the reconversion of the main structure into a single-family residence, as required by the injunction. Responsibility for these acts, or omissions, was upon Mrs. Donovan as owner of the property. She was found in contempt and fined $500 for each of the seven contemptuous acts of renting apartments. She was also found in contempt and fined $500 for failing to remove the apartments from the main structure, and $500 for failing to remove the apartments from the garage.

[8] Section 1218 of the Code of Civil Procedure provides as follows: "Upon the answer and evidence taken, the court, judge or justice must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars * * *." The constitutionality of this section was upheld in In re Garner, 179 Cal. 409, 177 P. 162.

[9] Said section 1218 does not limit the court to a total fine of $500. Where separate contemptuous acts are committed, the contemner can be fined for each offense in the amount authorized by the code. Golden Gate Con. H. M. Co. v. Superior Court, 65 Cal. 187, 192, 3 P. 628; Solano Aquatic Club v. Superior Court, 165 Cal. 278, 279, 131 P. 874; In re Shuler, 210 Cal. 377, 406, 292 P. 481; Hume v. Superior Court, 17 Cal.2d 506, 515, 110 P.2d 669; Lindsley v. Superior Court, 76 Cal.App. 419, 433, 245 P. 212; Note, 160 A.L.R. 1104.

[10] Petitioners contend that they were not guilty of separate contemptuous acts, but rather of a single course of conduct for which but one $500 fine could be imposed. However, the trial court could properly consider the several acts of the petitioners—in renting apartments to persons other than members of their own family, in failing to remove apartments from the main structure and to reconvert the same to a single-family dwelling, and in failing to remove the apartments from the garage—as separate contemptuous acts. See Solano Aquatic Club v. Superior Court, supra, 165 Cal. 278, 131 P. 874; In re Shuler, supra, 210 Cal. 377, 292 P. 481; and Lindsley v. Superior Court, supra, 76 Cal. App. 419, 245 P. 212. Each act, or failure to act, considered alone could be the basis for a contempt proceeding.

The trial court, therefore, had jurisdiction to impose a fine not exceeding $500 for each contemptuous act of each petitioner, and, as the court did not impose a fine in excess of that amount for any such act, we cannot hold the aggregate amount of the fines imposed upon petitioners to be excessive. Lindsley v. Superior Court, supra, 76 Cal.App. 419, 433–434, 245 P. 212.

[11] Petitioners finally contend that there was no showing as to their ability to comply with those portions of the injunction which directed them to remove certain apartments and reconvert the main structure. Petitioner John Donovan was not found in contempt for this failure, and the argument is not properly made as to him. Concerning Mrs. Donovan, the affidavit of Leslie S. Storrs alleged that she had the ability to comply, and the trial judge so found. Mrs. Donovan had the burden of showing her inability. Ex parte Spencer,

83 Cal. 460, 465, 23 P. 395; In re Mason, 69 Cal.App. 598, 605, 232 P. 157; In re Pillsbury, 69 Cal.App. 784, 788–789, 232 P. 725; and In re Carpenter, 36 Cal.App.2d 274, 278, 97 P.2d 476. Since she made no effort at the contempt hearing to meet this burden, her contention in this regard is without merit. See In re Purmel, 112 Cal. App. 313, 296 P. 644.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice (concurring).

This opinion follows the law. I must, therefore, concur in it. I am, however, impressed with the idea that the punishment appears to be severe. The record of the unfortunate events which brought the petitioners to their present position indicates that at all times concerned they have been sincere in their belief that they were but asserting rights of private property guaranteed to them by the Constitution of the United States, and that they were led into at least some of their errors by agents, and by acts, of the government which now prosecutes them. Whether they can make a substantial showing in mitigation of punishment can be determined by the court in which a proceeding to that end may be instituted. City of Vernon v. Superior Court (1952), 38 Cal.2d 509, 519–520, 241 P.2d 243; City of Vernon v. Superior Court (1952), Cal.Sup., 250 P.2d 241.

CARTER, Justice (concurring).

In view of the position taken by Mr. Justice Schauer in his concurring opinion in this case, I cannot refrain from calling attention to a matter that should be obvious, and that is, that it is the view of Mr. Justice Schauer that even though section 1222 of the Code of Civil Procedure provides that judgments and orders of a court, judge or justice, made in cases of contempt are final and conclusive, and that all of the decisions of this Court and of the District Courts of Appeal of this state dealing with contempt cases so hold, nevertheless after a judgment of contempt has been affirmed, the contemner may institute a proceeding in the court imposing the judgment and there obtain a remission of the punishment. Mr. Justice Schauer cites as his only authority for his position the cases of City of Vernon v. Superior Court, 38 Cal.2d 509, 241 P.2d 243, and City of Vernon v. Superior Court, Cal.Sup., 250 P.2d 241, of which he is the author. As pointed out in my concurring opinion in the last-cited case, the holding therein is diametrically contrary to the holding of the majority of this Court in the case at bar. But if Mr. Justice Schauer is correct in his holding in the City of Vernon case and in his concurring opinion in this case, there can be no finality to a contempt judgment, and section 1222 of the Code of Civil Procedure is a nullity.

I agree with Mr. Justice Schauer that the majority opinion in this case follows the law, and I likewise agree with him that the punishment imposed in this case appears to be severe, but my conscience and respect for the law prevent me from taking the further step with him and holding that where a trial court acts within its jurisdiction and exercises its discretion in imposing a judgment of contempt, that such judgment may be annulled on certiorari which can only be invoked to test jurisdiction. For this reason, I must concur in the judgment of affirmance in this case which is in direct conflict with the views expressed by the same majority of this Court in City of Vernon v. Superior Court, Cal.Sup., 250 P.2d 241.

114 Cal.App.2d 385

PRICE et ux. v. HOVSEPIAN.

Civ. 15002.

District Court of Appeal, First District,
Division 2, California.
Nov. 26, 1952.

Action by tenants against landlord for unlawful eviction and conversion of personal property. From a judgment of the Superior Court, City and County of San Francisco, Edward P. Murphy, J., in favor of the plaintiffs on the cause of action for unlawful eviction but in favor of the defendant on the issue of conversion, both parties appealed. The Court of Appeal, First Appellate District, Division Two, Dooling, J., held that findings showed that tenants' rent was not in default at time of eviction and that evidence established that defendant had converted the plaintiffs' property by locking them out of the apartment.

Judgment affirmed in part and reversed in part.

1. Appeal and Error ⚷1036(1)

Where action was improperly commenced by husband as guardian ad litem for his wife when she was over 18 and married, but she was ordered substituted as a party in her own right before the trial, error in not making wife a party in the first instance was not prejudicial to defendant. Civ.Code, § 25.

2. Landlord and Tenant ⚷180(6)

In tenants' action for unlawful eviction, findings supported by tenants' testimony showing that eviction occurred prior to time for payment of remainder of first month's rental were conclusive that no rent was due at time of eviction. Civ.Code, § 1861a.

3. Landlord and Tenant ⚷245

Where no rent was due at time of eviction of tenants, landlord had no lien on personal property for unpaid rent. Civ. Code, § 1861a.

4. Landlord and Tenant ⚷161(1)

Action of landlord in locking tenants out of apartment while their property was inside constituted a conversion of the property.

5. Evidence ⚷588

Courts may ordinarily disbelieve a part of a witness' testimony and believe other parts.

6. Landlord and Tenant ⚷161(3)

In tenants' action for conversion of personalty by landlord, trial court's finding that there had been no conversion could not be sustained under the evidence in view of further explicit finding that landlord had locked the tenants out of the apartment.

7. Landlord and Tenant ⚷161(3)

Where landlord locked tenants out of apartment, conversion of tenants' property within apartment was then complete, and any subsequent request that tenants come and remove their property came too late to mitigate damages. Civ.Code, §§ 3336, 3337.

8. Appeal and Error ⚷1177(1)

Reviewing court, upon reversing trial court's finding that landlord had not converted tenants' property, would not make finding of conversion and award damages, but remanded that issue for a retrial.

◆

Pinney & Smith, W. M. Pinney, Jr., San Francisco, Guernsey Carson, San Francisco, of counsel, for plaintiffs-appellants.

William Steinberg, San Francisco, for defendant-appellant.

DOOLING, Justice.

Plaintiffs, who are husband and wife, sued in a single cause of action for unlawful eviction and conversion of certain personal property. The court, sitting without a jury, found that plaintiffs had been wrongfully evicted and awarded them as damages therefor $892.50. The court also found that there had been no conversion of their personal property. Plaintiffs and defendant have both appealed from the judgment.

[1] On defendant's appeal he raises the question that Mrs. Price was not a party to the action. The action was commenced by her husband as her guardian ad litem at a time when Mrs. Price was in fact over 18 years of age and being married was an

adult under sec. 25, Civ.Code. Before the trial she was ordered substituted as a party in her own right. It does not appear that defendant made any objection to the substitution or how he has been in any manner adversely affected by what at the most was a mere procedural error in the original appointment of a guardian ad litem which was later corrected by substituting Mrs. Price as a party plaintiff in her own name.

[2] The premises rented by plaintiffs from defendant are claimed to have constituted a furnished apartment and defendant argues that under sec. 1861a, Civ. Code, "if rent is not paid for the accommodations, the owner of the accommodations can dispossess and evict the tenant or guest without liability." However interesting this contention may be as an abstract question of law it has no application to the facts as proved and found by the court. The complaint alleged and the court found that on or about April 22, 1948, the plaintiffs and defendant entered into an oral agreement to rent plaintiffs a certain apartment at $40 per month, that $10 was immediately paid, that it was further agreed that the additional $30 for the first month's rental should be paid on May 1, 1948, and that the eviction occurred on or about April 28, 1948. These findings are supported by plaintiff husband's testimony and, although contradicted by defendant's testimony, are conclusive that no rent was due and unpaid at the time of the eviction.

[3] The sole claim of plaintiffs on their appeal is that the court erred in finding that there was no conversion of their personal property. The only answer to this contention made by defendant is that under sec. 1861a, Civ.Code, defendant had a lien on the personal property for unpaid rent. Van Dorn v. Couch, 21 Cal.App. Supp.2d 749, 64 P.2d 1197. Since the court found that at the time of the eviction no rent was due the major premise fails.

Despite defendant's failure to argue the question of the insufficiency of the evidence to support the finding of no conversion, and the admission implicit in the sole argument made by him on this point that if defendant had no lien he did wrongfully detain plaintiffs' property, we have examined the evidence and find no logical support therein for the court's finding that there was no conversion.

[4] The plaintiff husband testified and the court found that the eviction occurred by defendant locking plaintiffs out of the apartment. If he locked plaintiffs out as expressly found by the court he locked their personal property in, because all the testimony shows that this property was inside the apartment. The denial of access to their property in this fashion constituted a conversion. Gruber v. Pacific States Savings & Loan Co., 13 Cal.2d 144, 88 P.2d 137; Pearl v. Figoni, 49 Cal.App.2d 662, 122 P. 2d 385.

Defendant's version was that he did not lock plaintiffs out, but that they voluntarily left and never came back after he demanded that they pay the rent, which he testified was then due.

> "I tell this gentleman upstairs, I say, 'Please bring me my rent and move out of this place.' And he never come back * * * and even he got his own lock on the door, and after three or four months I break that lock and open that closet * * *.
>
> "Q. Did you ever ask Mr. Price to take his stuff out of there? A. I told them take it and go, but he no come back."

[5, 6] While it is true that courts may ordinarily disbelieve a part of a witness' testimony and believe other parts, the testimony "I told them take it and go, but he no come back", is so obviously an integral part of defendant's testimony that he did not lock plaintiffs out but that they left voluntarily when he demanded the rent that a finding based on it cannot stand in the face of the court's explicit finding that defendant "locked out plaintiffs".

To reconcile its finding of no conversion with its finding that defendant locked plaintiffs out would require a finding that defendant offered plaintiffs a limited access to the locked apartment for the purpose of removing their personal property. There is simply no evidence to support such a finding.

[7] It is true that defendant did testify that at a later time he telephoned plaintiff husband's mother and father and asked them to have plaintiffs come and remove their property, but even if this evidence was believed the conversion was complete at the time of locking plaintiffs out of the apartment and, being wrongful from the beginning, this offer came too late even to mitigate the damages. Secs. 3336, 3337, Civ.Code; 1 Restatement of Torts, sec. 247.

[8] Plaintiffs ask us to make a finding of conversion and award damages therefor. We are not in a position to evaluate the testimony of the value and extent of the personal property converted and consider it proper to remand the entire issue to the superior court for a retrial.

The portion of the judgment awarding damages for eviction is affirmed. Insofar as the judgment fails to award damages for conversion it is reversed. Plaintiffs are allowed their costs on appeal.

GOODELL, J., concurs.

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114 Cal.App.2d 300

DAVIS et al. v. BASALT ROCK CO., Inc. et al.

Civ. 7912.

Sac. 6138.

District Court of Appeal. Third District, California.

Nov. 20, 1952.

Hearing Denied Jan. 15, 1953.

Proceedings on a motion to recall remittitur, after affirmance, 237 P.2d 338, 107 Cal.App.2d 436, of trial court's judgment. The District Court of Appeal, Van Dyke, J., held, inter alia, that statements in brief did not justify recall of remittitur.

Motion denied.

1. Appeal and Error 🔑1218

A remittitur may be recalled on reviewing court's own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth facts which will justify granting of order, and grounds of recall are fraud, mistake, or inadvertence, but not correction of judicial error.

2. Appeal and Error 🔑1218

Misstatement of material facts which will justify recall of remittitur is misstatement of facts presented in evidence, not mere faulty conclusion as to legal effect of those facts.

3. Appeal and Error 🔑1218

Statements in brief, constituted argument of counsel rather than misstatements of fact justifying recall of remittitur.

4. Appeal and Error 🔑1218

Fact that issue was not mentioned in opinion of District Court of Appeal would afford no ground for recall of remittitur, where movants had not availed themselves of opportunity to present such issue squarely on appeal, on petition for rehearing in District Court of Appeal, or on petition for hearing in Supreme Court.

5. Appeal and Error 🔑1221

If a party is dissatisfied with the judgment rendered in an appellate court, his remedy is to petition for a rehearing or modification of the judgment within the time allowed by law and before the remittitur has issued.

◆

Gardiner & Riede and Delger Trowbridge, San Rafael, for appellant.

Riggins, Rossi, King & Kongsgaard and King & Ghidella, Napa, for respondent.

VAN DYKE, Justice.

This is a motion to recall remittitur. In an action wherein movants as plaintiffs sought to have declared the respective rights and obligations of the parties to a written contract, a judgment was rendered adverse to their contentions and from that judgment they appealed. The matter of the appeal was referred to this Court and our decision appears in 107 Cal.App.2d 436, 237 P.2d 338. Therein will be found a statement of the case which we will not repeat. We affirmed the decision of the trial court. Movants asked for a rehearing, which was denied. They then applied to the Supreme Court for a hearing. This also was denied. Now the appellants, as moving parties, ask this Court to recall its remittitur.

[1] In the recent case of Southwestern Investment Corporation v. City of Los Angeles, 38 Cal.2d 623, 241 P.2d 985, 986, the principles governing the recall of a remittitur were stated as follows:

> "That a remittitur may be recalled on the reviewing court's own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth the facts which will justify the granting of the order is now determined by Rule. Rule 25(d), Rules on Appeal; 36 Cal.2d at p[age] 22. The question as to when the facts constitute grounds for the granting of the motion is resolved by the case law. Other than for the correction of clerical errors, the recall may be ordered on the ground of fraud, mistake or inadvertence. The recall may not be granted to correct judicial error. * * * In the McGee case [In re McGee, 37 Cal.2d 6, 229 P.2d 780] it was pointed out that a decision is inadvertent if it is the result of oversight, neglect or accident, as distinguished from judicial error. In Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal.App.2d 1, 204 P.2d 387, an order recalling the remittitur was vacated when on analysis it appeared that the purpose of the recall was merely to amend the judgment on appeal."

In Rowland v. Kreyenhagen, 24 Cal. 52, 59, it is stated:

> "* * * [A]s a general rule, this Court cannot exercise any jurisdiction over a cause in which the remittitur has been issued by its order and filed in the Court below. The office of the remittitur is to return the proceedings which have been brought up by the appeal to the Court below, and when the remittitur has been duly filed, the proceedings from that time are pending in that Court, and not in this; and, in regard to them, it is not competent for this Court to make any further order.
>
> "But this general rule rests upon the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the Court or the opposite party; for if it appears that such has been the case, the appellate Court will assert its jurisdiction and recall the case. Against an order or judgment improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, this Court will afford relief after the adjournment of the term; and will, if necessary, recall a remittitur and stay proceedings in the Court below. This is not done, however, upon the principle of resumption or jurisdiction, but upon the ground that the jurisdiction of the Court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the Court, and may be treated as a nullity."

The motion here is made "on the ground that fraud and imposition were practiced upon this Court, and upon the plaintiffs, cross-defendants and appellants in the above entitled matter, and misrepresentations were made to this Court by respondents' attorneys, and that inadvertence, oversight and accident occurred in the decisison of this case by this Court, all of which caused this Court to reach an erroneous result, and that the granting of said motion and the reconsideration of said decision of this Court will be in the interests of justice."

[2, 3] Movants contend that this Court was wrongfully imposed upon through the making by respondents' counsel, in their briefs on appeal, of misstatements of fact concerning the contents of the record. They specifically set forth six of these alleged misstatement of fact. They say, quoting from the brief of respondents, that the following misstatements were therein made: "1. 'Plaintiffs' attorney offered evidence at the trial in aid of the interpre-

tation of the contract.' 2. 'The judgment of the trial court interpreting the contract is harmonious and consistent and that it is supported at all points by the evidence in the case.' 3. 'The trial court interpreted the contract in the light of conflicting evidence. There was not only evidence that supports the court's interpretation, but the overwhelming preponderance of the evidence supports it.' 4. 'These were all questions of fact to be determined by the trial court in interpreting the contract and its decisions on conflicting evidence would be binding, but the overwhelming preponderance of the evidence sustains our statements.' 5. 'We have pointed out the fact that several of the findings are supported by the evidence in discussing the facts.' 6. 'The arguments advanced by appellants presented at most only a conflict in evidence.' "

The alleged misstatements are not misstatements of fact. They constitute argument of counsel. Whether such argument would withstand appellate scrutiny, the record considered, is not of moment here. A misstatement of material facts which would justify recall of the remittitur necessarily means a misstatement of facts presented in evidence—not a mere faulty conclusion as to the legal effect of those facts. Statements such as are here alleged to have constituted material misstatements of fact commonly appear in briefs filed and we think are not taken by appellate courts as anything more than argument. They are neither intended, nor fitted, to deceive the reviewing court.

It is next argued that this Court, relying on the alleged misstatements of fact which we have set forth above, "made no attempt to analyze the evidence to see whether the interpretations of the contract by the trial Court were in any way justified." We do not doubt that counsel for movants here sincerely feel they are justified in the foregoing charge. They have demonstrated in their briefs on appeal, for rehearing here, and for hearing by the Supreme Court, that they are utterly in disagreement with all of the courts that have acted in the matter. We can only say that at least we made an attempt to analyze the evidence itself, relying not at all upon the argumentative statements quoted from respondents' briefs. We read the entire record having to do with the construction of the subject contract, and many portions of it we reread. Also we considered the contract which was being construed and of course that instrument is the first and highest evidence as to the intent of the parties in executing it. If any defects exist in our appellate consideration of the case, a point which we do not concede, the defects are the result of judicial error and not of any alleged misrepresentations of fact made by counsel.

Having concluded that respondents' counsel made no misstatements of fact and having asserted that this Court in its appellate consideration did not rely upon the argumentative generalizations quoted from their brief, we might, and perhaps should, indulge in no further discussion concerning these assignments of fraudulent conduct on the part of respondents' counsel. But movants state that things said in our written opinion demonstrate that this Court acted under misapprehension as to material facts and circumstances of the cause, and we will discuss these assignments. In this connection movants criticise the following statement in the opinion we filed 107 Cal.App.2d at page 438, 237 P.2d at page 339: "They [plaintiffs below] sought to introduce, and were by the trial court permitted to introduce, evidence of the facts and circumstances attending the execution of the contract as an aid to its interpretation. We think the contract was sufficiently ambiguous to justify the introduction of such evidence. The result is that this Court upon appeal is bound by the interpretation of the trial court where it is reasonable and is supported by the evidence introduced." It is argued that the above statement is not correct because "the contract was not ambiguous, which respondent itself admits on page 71 of its opening brief." Movants state that the real truth is that their attorney at the trial "only offered evidence on one point, namely, to determine the meaning of the word 'Pumicite', which the Court interpreted in favor of the plaintiff." This action was begun, as we have said, to have the respective rights and obligations of the parties to a written contract declared. Movants, as plaintiffs below, pleaded that there existed an actual, substantial and bona fide dispute as to the meaning, interpretation and effect of the contract. Their complaint set forth some 23 separate claims made by them as to their rights and obligations under the subject instrument, and it was asserted these claims were disputed and denied by respondents. As used in the contract the meaning of the word "pumicite" was resolved by the trial court in a finding reading as follows:

> "That contained in said real property is a deposit of an agglomerate of fragmental volcanic debris and pyroclastic material, consisting in large part of fragments of pumice, subordinate portion of fragments of non-pumiceous lavas varying in size from fine sand up to fragments several feet in diameter, and a mineral cementing the aforesaid fragments together containing silica, ferric oxide, alumina, lime, magnesia and moisture; that the pumice in said material has been referred to by all persons involved herein as pumicite and is herein referred to as pumicite; * * *."

In short, the trial court found that pumicite meant pumice. But the 23 specifications of dispute as to the meaning of the subject instrument contained many matters not resolved by the trial court's finding as to the meaning of the word "pumicite"; and that these further differences were matters of concern and the subject of evidence introduced at the trial is made manifest by the record. In their opening statement at the trial movants' counsel said: "We seek an interpretation of a contract dated May 6, 1938. We maintain by the first count of our complaint that there are a number of differences; and, as a matter of fact, the answer to the complaint acknowledges that there are all of those differences." A few pages further on in the transcript the same counsel said in effect that the claim they were entitled to receive unadulterated pumice was the basis of the controversy and that several other controversies were involved. When the chief officer of respondent corporation was being examined under section 2055 of the Code of Civil Procedure we find the following:

> "Q. [By plaintiffs' counsel] I assume that during that first period there was considerable discussion of what the contract was to be? A. That is right.
>
> "Q. During that first period was there any discussion of what pumicite is or was?
>
> "Mr. King [counsel for defendant]: I am going to object to this question on the ground that it is incompetent, irrelevant and immaterial, and that no proper foundation has been laid. There are allegations of the complaint wherein the plaintiffs allege certain construction of the contract, which, of course, we deny, and we admit in our answer that we dispute their claims; but we don't admit the contract is ambiguous and we still claim that the contract speaks for itself and that there was no ambiguity.
>
> "Mr. Gardiner [counsel for the plaintiffs]: If the Court please, my understanding of a declaratory relief action invites the possibility of the Court investigating the whole meaning of a contract, and apparently under some circumstances that can result in calling black white. The actual intention of the parties in drafting the contract is under investigation in a declaratory relief action. I understood the Court had already passed on this matter by overruling a demurrer. This is the very question we are here to investigate.
>
> "The Court: What do you propose to show here?
>
> "Mr. Gardiner: I presume the objection made goes generally to the question of what the discussions were leading up to the actual signing of this contract. I have a very considerable number of questions. *I wish to show the entire conversation that took place for the purpose of interpreting that contract. I wish to find out from Mr.*

Streblow what the parties intended by the use of the word pumicite. I wish to find out what the parties intended by the reference to a material for plaster aggregate. I wish to find out and show what they intended by the expression 'other admixture', and what they referred to by the expression 'blend', and how they discussed those matters and what their agreement actually means on all those subjects.

"The Court: Pumicite is first, and then what is next?

"Mr Gardiner: Pumicite is the first one. The next is the general question of what was intended by the expression 'material for plaster aggregate,' and whether they had a particular kind of material in mind or whether they had mill run in mind, and then a discussion of the word 'blend', whether that had to be a mix or a blend. *Well, I might say all the questions are raised in our complaint that we say the parties are disputing right down the line, the whole series of controversies between the parties. I wish to find out whether those subjects set forth in the complaint as the present controversies were discussed in Gordon Johnson's office.*

"The Court: You intend to set up the circumstances under which the contract was executed in order that you may have it interpreted generally and particularly with reference to the specifications which you have mentioned?

"Mr. Gardiner: That is right, Sir.

"The Court: All the elements which you have specified?

"Mr. Gardiner: That is correct.

"The Court: I think it is permissible, but I will hear you. [speaking to respondents] * * *.

"The Court: He can't do that all at one time. He is trying to show by proof of surrounding circumstances that ambiguity does in fact exist.

"Mr. Gardiner: I might say that the pleadings disclose ambiguity.

"The Court: They allege ambiguity; they don't disclose it.

"Mr. King: We want the Court to interpret the meaning of the contract as it is written, not by something they said.

"The Court: I appreciate that is your side of the case.

"Mr. King: We don't allege an ambiguity.

"The Court: No, but he does on his side, and he wants to prove that under the general scope of the pleadings."

In view of the foregoing we can only conclude that it was not the movants' theory in the trial court to offer evidence on only one point, that is to determine the meaning of the word "pumicite". We think these quotations from the transcript support the statement in our opinion that appellants "sought to introduce, and were by the trial court permitted to introduce, evidence of the facts and circumstances attending the execution of the contract as an aid to its interpretation." We readily admit, as insisted upon by movants' counsel, that both sides frequently stated that in many respects concerning the disputes between them, indeed in most, the contract was not ambiguous, but on the contrary clear, certain and not to be misunderstood. Nevertheless, each side claimed that the contract clearly declared in the way they interpreted it, and just as clearly excluded the meaning contended for by the opposing side. Such a situation is a familiar one. Such a situation also lends support to a determination that a contract capable of stating so clearly such opposite things is sufficiently ambiguous to justify the calling in of all permissible aids for its proper interpretation.

It is next stated by the movants that this Court in its opinion made the following misstatement of fact, indicating that it was acting under misapprehension: "During this period Davis, who alone placed orders for material did not complain that the material from the King deposit processed, as the court found was intended, did not meet the contract requirements." This quoted sentence from the opinion is made the subject of bitter attack. Concerning it, and after quoting it, the appellants in their petition for a rehearing said: "We cannot understand how this misconception of fact occurred. We are certain that Respondents will make no such claim. The dissatisfaction and complaints of Davis for a full ten years were so bitter that none of the parties involved will likely ever minimize them." And further concerning the quoted sentence it was said in the petition for hearing by the Supreme Court: "This statement is almost amusingly false to those who went through that ten years of bitter controversy." The quoted sentence is taken from context. The preceeding sentence read: "Also upon this matter of the purity of the pumice the court had the benefit of the acts of the parties through the years *before any dispute arose*." See Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17. We think enough, and perhaps too much, has been said about this matter which, after all, is minor. It certainly would furnish no justification for holding that the decision of this Court was inadvertently or improvidently or irregularly made.

It is argued by movants that the holding of this Court as expressed in its opinion that the contract in question was not assignable as far as the rights therein given to Mr. and Mrs. Davis were concerned was inadvertently made. We think nothing more need be said concerning this contention than to refer to our recorded opinion concerning the matter of assignability. It is apparent that we have here nothing in the nature of inadvertence. And as we have said, it is not proper in ruling upon the motion before us to discuss what cannot be anything but a claim of judicial error.

It is finally contended that this Court, as a result of inadvertence and accident "failed to hold that the contract in litigation is survivable." Says counsel for movants: "*An entirely different question* * * * never expressly passed on by this or any other Court is whether the contract is *survivable* as distinguished from *assignable*, i. e., whether this contract survives to the administrators or executors of the Davises." The trial of this case was lengthy; there were competent counsel on both sides; there was an experienced and able trial judge presiding; there was opportunity to move for additional findings in respect of the matter of survivability if the parties deemed the matter important, and no such motion was made; the matter of survivability was at best only inferentially posed by the pleadings; and if the trial court did rule on survivability, the ruling can only justly be described as implied rather than express. No express holding upon the subject will anywhere be found in the entire record. Certainly this Court did not say anything about the subject in its opinion and we think we may be excused in view of what we have just said and of the following additional considerations: Plaintiffs in the action were Alice M. Davis individually, Alice M. Davis as administratrix of the Estate of J. E. Davis, deceased, and Hal H. Schwartz. By their complaint they specified the points of disagreement between themselves and the defendants under 23 specifications and they did not specify that the survivability of the contract was one of them. It might be argued that inferentially the pleadings posed the question of survivability in that the administratrix of the estate of J. E. Davis was a party, and in that as to the specifications of dispute it was alleged that "plaintiffs and their assignees" were entitled to certain rights, which is to say, though not expressly, that Alice M. Davis as executrix was one of those entitled to such rights. However beyond that the pleadings do not go. The answer of defendants did raise the issue of assignability but set forth no claim dependent upon lack of survivability. The findings say nothing expressly about survivability but inferentially it might be argued that a ruling was made that the contract was not survivable. That occurs in this way: The court found "That upon the death of said J. E. Davis his interest in said contract * * * terminated and the power of plaintiff Hal H. Schwartz as attorney in fact of said decedent terminated." The finding referred to occurred within the following context: There was a precedent finding that on October 31, 1946 J. E. Davis and Alice Maud Davis executed to plaintiff Hal H.

Schwartz a power of attorney authorizing him as their agent to make purchases under the contract; that J. E. Davis had died and Alice M. Davis had been appointed and qualified as his administratrix. Then followed the finding quoted. It is apparent that the trial court was concerned in that portion of the findings with the continued existence in Hal H. Schwartz of a power of attorney authorizing him to make purchases as the agent of the Davises and it is difficult, in view of the context, to read the finding concerning terminations of the interest of J. E. Davis upon his death as relating to anything other than the power of attorney he had given during his lifetime. We may state further that the memorandum opinion of the trial court was made part of the record and therefrom it appears that while the trial court declared, first, that the contract had not been assigned to Schwartz, and, second, that it was not assignable, yet nothing was said concerning survivability. Passing on to the opening brief we find that survivability was referred to in one of the headings, which read as follows: "Contrary to the express terms of the contract and the surrounding circumstances the court found that the contract was not transferable by the Davises *or by death succession*." (Emphasis added.) Thereafter the argument was expanded and the expanded argument had nothing to say regarding survivability, but was devoted to assignability. The argument began thus: "Those [referring to the quoted findings] are nothing more than legal conclusions at the best, and merely indicate that the trial Court thought that the contract on its face was nonassignable as a matter of law." The reply brief discussed assignability, respondent to the contentions of the appellants upon that subject, but said nothing as to survivability. The closing brief omitted any discussion of survivability, though devoting some space to assignability. We granted appellants' request for permission to file supplemental authorities and there was filed a "Summary of Principal Issues" wherein one of five issues was thus stated: "Is the contract assignable: Will it survive the death of J. E. Davis?" The petition for a rehearing devoted one heading to assignability, but said nothing of survivability. At oral argument the following was said, inter alia: "The trial court decided because there was some economic hardship involved * * * they should be allowed to escape. Although it said the contract was assignable, nevertheless the trial court said it was not assignable and when J. E. Davis died it died with him and his administratrix took nothing whatever. * * * The trial court said, 'I am going to relieve you by finding it died with the people who first wrote it.'" Nothing further appears in our record of the oral argument with reference to survivability.

[4, 5] The foregoing makes it clear that, first movants are correct in their statement that no court has expressly passed upon the question of survivability as distinct from assignability. It shows further that the matter of survivability, if the parties considered it to be an issue and material, was at most but sketchily presented to this Court as an issue; that after this Court's opinion had been handed down appellants did not in their petition for rehearing call this Court's attention to the fact that we had not therein treated the question of survivability and that movants did not ask that a rehearing be granted in order that that issue might be expressly passed upon. Under these circumstances we think that the fact that this matter of survivability was not mentioned in the opinion of this Court affords no reason whatever for the recall of the remittitur. To permit movants to have the remittitur recalled for this reason would be to permit litigants to present the merits of an appeal piecemeal. That cannot be done. There was ample opportunity to present the issue of survivability squarely. This was not done—not even on petition for rehearing here, nor on petition for hearing in the Supreme Court. Pertinent here is what was said in Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal.App.2d 1, 3, 204 P.2d 387, 388:

> "We are impressed that the facts in the instant case bring it within the rule that if a party is dissatisfied with

the judgment as rendered in an appellate court, his remedy is to petition for a rehearing or modification of the judgment within the time allowed by law and before the remittitur has issued."

The motion to recall remittitur is denied.

PEEK, J., and SCHOTTKY, J., pro tem., concur.

114 Cal.App.2d 283

FREESE v. SMITH.

Civ. 14917.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1952.

Suit for partnership accounting. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Goodell, J., held that where it was custom of partners each to handle his own work separately, and partners allegedly agreed to terminate partnership by each taking care of winding up business then in hands of each partner, although no attempt was made to follow accounting method set up in partnership agreement to be used upon dissolution, provision in partnership agreement for division of profits and losses during ordinary operation of business was applicable in determining profits and losses from business done during winding up period.

Judgment affirmed as modified.

1. Partnership 🔑311(1)

Where partnership agreement, which provided for accounting method on termination of partnership, dealt with accounting procedure only upon death or retirement of a partner, and partners agreed that upon dissolution each would wind up business in his own hands, and partners made no attempt to follow accounting method set up by partnership agreement, accounting method in agreement was not applicable, and court, in action for accounting would follow general rules and principles governing dissolutions.

2. Partnership 🔑311(1)

Where it was custom of partners each to handle his own work separately, and partners allegedly agreed to terminate partnership by each winding up business then in his own hands, although no attempt was made to follow accounting method set up in partnership agreement to be used upon dissolution, provision in partnership agreement for division of profits and losses during ordinary operation of business was applicable to business done in winding up period. Corporations Code, §§ 15021, 15026, 15029, 15030.

3. Partnership 🔑308

Where partners agreed to wind up partnership business by each taking care of business in his own hands on June 30, 1946, and winding up period extended into March of 1948, which was some eight months after suit for accounting was commenced, and share of each partner did not become settled or determined until court stated account at end of trial, the allowance of interest from the start of winding up period was improper.

* * *

Cooley, Crowley & Gaither, San Francisco, for appellant.

Albert Picard, San Francisco, (Raymond N. Baker, San Francisco, of counsel), for respondent.

GOODELL, Justice.

This appeal is from a judgment for $5,115.47 and interest, in an accounting suit arising out of a partnership between the litigants, which existed from April 1, 1945 to July 5, 1946.

Both parties were experienced fire insurance adjusters who had been engaged in that work in San Francisco for many years.

On February 17, 1944 they made a contract wherein respondent agreed to assist appellant in his established adjustment business, and appellant agreed to pay him either a sum equal to 20% of the annual net income of the business or 75% of the increase of its annual net profits in excess of $17,559.91 whichever was greater, to be computed quarterly, commencing on April 1, 1944. Respondent was allowed a monthly drawing account of $300, his withdrawals to be deducted from his ultimate earned percentage.

On May 24, 1945 they made a second contract wherein they agreed to continue the same business as partners under the name of "The R. V. Smith Company" which arrangement was terminated on July 5, 1946. After the latter date each of the parties was engaged for some months in winding up the firm business then on hand.

Thus three periods were embraced in the accounting, the first called the "association period", the second the "partnership period" and the last the "winding up period."

The business consisted of the investigation and adjustment of claims for fire losses which the insurance companies referred to them. When these claims came in they were generally divided up between the parties in a routine way. Occasionally, however, a company would ask that appellant handle a particular loss in the absence of which request the firm's secretary would distribute the work between the two except that the larger losses were usually handled by appellant and the smaller ones by respondent. It was the fixed practice, however, that once the claim was turned over to one or the other it continued in his hands right through to its completion. On July 5, 1946 each of the parties had in hand, in process of investigation and adjustment, a number of these claims and it was agreed between them that each would continue to handle the ones he then had until their completion.

The principal controversy centers around the credits coming to respondent arising from the claims which had come into the office as new business during the period April 1, 1945–July 5, 1946 but which were not concluded until the "winding up period".

The partnership articles recited the earlier association of the parties, and that they desired "that from April 1, 1945, this association be continued on a partnership basis". Paragraphs 4, 7, 8, 9 and 10 read as follows:

"4. There shall be a quarterly auditing account of income and general office expenses. The net profits as disclosed by this audit will be divided 66⅔% to R. V. Smith and 33⅓% to Ralph P. Freese less the sums, not including the personal business expense as drawn by each party during the current period of each quarterly audit. This division of net profit is to be drawn and paid quarterly * * *.

"7. It is herewith provided that in case of death or retirement of either party to this partnership, the business, good will, firm name, office equipment, records and printed matter and all outstanding indebtedness will revert in their entirety to the surviving or succeeding partner, without compensation or distribution to any beneficiary of of either estate, except as provided in paragraph No. 8.

"8. The surviving member as set forth in paragraph No. 7, shall assume the responsibility and shall complete and close any pending losses of the other and shall turn over all fees and unpaid expense thereon to the beneficiaries of the deceased member or to the member himself in the case of his retirement from any cause. There shall be a reasonable deduction for a fair and equitable charge for services in closing such files.

"9. This agreement shall remain in force and effect for a period of two years and be automatically reinstated and continued each year thereafter unless cancelled as herein provided or unless otherwise terminated. This agreement may at any time be subject to any amicable agreed amendments.

"10. This agreement may be cancelled by either party by giving thirty days notice of cancellation or termination to the other party. In this event, the method of disposing of pending business shall be on the basis provided in paragraph No. 8. The value of the furniture and fixtures is agreed to be

$1,500.00, with interest in same as $1,200.00 to R. V. Smith and $300.00 to Ralph P. Freese.”

The trial judge wrote an opinion which incorporated a statement of the account between the parties. This statement speaks of “claims assigned”, which means claims or proofs of loss referred and turned over to the office by insurance companies for investigation and adjustment of fire losses. It shows clearly and graphically just how the judgment of $5,115.47 was arrived at by the court. It is as follows:

“*Association period*		
“Income from claims assigned during period 4/1/44 to 3/31/45		$22,287.52
“Work in process at 3/31/45 reduced to income in subsequent period		12,739.32
		$35,026.84
“Less expenses		8,747.91
		$26,278.93
“Deduct: Alternative agreed base		17,559.91
		$ 8,719.02
75% of $8,719.02	$6,539.26	
Less: withdrawals	4,318.83	
“Due plaintiff	$2,220.43	
“*Partnership period*		
“Income from claims assigned during period 4/1/45 to 6/30/46		$42,289.36
“Work in process at 6/30/46 reduced to income subsequently		
“By R. V. Smith	12,013.38	
“By R. P. Freese	2,315.05	14,328.43
		$56,617.79
“Less expenses		13,462.69
		$43,155.10
33⅓% of $43,155.10	$14,385.03	
Less: withdrawals	11,489.99	
“Due plaintiff	$ 2,895.04	

Summary:

“Due plaintiff:	
“From association period	$2,220.43
“From partnership period	2,895.04
“Total	$5,115.47”

Shortly before the trial the litigants agreed on accountants to audit the books. The audit shows that during the partnership period $42,289.36 was earned by the firm on business which came in between April 1, 1945 and June 30, 1946. It shows also that during the “winding up period” $14,328.43 was reduced to income from business in the hands of both partners which had come in prior to July 5, 1946. The item of $2,220.43, shown as owing to respondent as the product of the “association period”, is not questioned by appellant.

Appellant contends that the court erred in treating the $14,328.43 (reduced to income during the “winding up period”) the same as it did the $42,289.36 (reduced to income during the “partnership period” proper) which meant, of course, that respondent got his full 33⅓% participation in the “net” of the held-over business *handled by both parties.*

The main basis for appellant’s attack was the claim, set forth in his separate defense, that on the termination of the partnership the parties “agreed upon a settlement of their obligations as partners, one to the other, and plaintiff agreed to accept, and did accept, in full satisfaction of all his interest in the assets of said partnership, and in full satisfaction of all defendant’s obligations and liabilities to him, certain furniture and office equipment and certain unfinished insurance loss adjustment matters belonging to said partnership”. The court found flatly against this defense, and in its opinion said: “This contention in my opinion is not borne out by and is inconsistent with the evidence. In particular it is inconsistent with the testimony of plaintiff which I find to be entirely credible that about August 13th, 1946 he asked Smith for an accounting and that Smith said that plaintiff should wait until the accounts were closed and the firm bills paid. Thereafter and in October according to Freese defendant offered to pay him * * * $2500.00 in settlement of his claim which offer plaintiff refused. On or about January 8th, 1947, according to Freese, Smith informed him that he owed Freese * * * $4200.00 which sum Freese refused to take as being inadequate. Such an offer was of course entirely inconsistent with defendant's whole position in the case. I may add that all of this evidence of offers of settlement went in without objection."

No attack is made by appellant on the sufficiency of the evidence to support the finding against appellant on his separate defense.

One inconsistency in appellant's position has just been pointed out. Another is found in appellant's contention that an "accounting between partners is to be governed by the copartnership agreement." Mervyn Investment Co. v. Biber, 184 Cal. 637, 644, 194 P. 1037, 1040, in the face of the special defense just noted, that the parties made another agreement on or about July 5, 1946.

But over and above these inconsistencies, appellant's claim that the terms of the partnership agreement are controlling is difficult to follow since there is no attempt to show how such terms could possibly furnish a method or pattern for the accounting.

Section 10, under which appellant brought the partnership to a "cancellation or termination" by a 30-day notice, provides that in such event "the method of disposing of pending business shall be on the basis provided in paragraph No. 8". Paragraph 8 must be read with paragraph 7 which deals only with death or retirement, in either of which events there would really be a surviving member. Neither paragraph 7 nor 8 was designed for, or can be made to fit, a case such as this, as a glance at them will show. Moreover, the testimony of both parties shows that they agreed that each would wind up the business then unfinished in his own hands, which eliminates all idea of a "surviving member" or a "succeeding partner".

[1] The record shows no evidence of any attempt by the partners themselves to follow paragraphs 7 and 8 in "disposing of pending business".

Accordingly the court had to follow general rules and principles governing dissolutions.

Section 15021, Corporations Code, provides: "(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. * * *"

Section 15026 reads: "A partner's interest in the partnership is his share of the profits and surplus * * *."

Section 15029 reads: "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business".

Section 15030 reads: "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed".

These sections were enacted in 1949, but they are simply repetitions of the law as formerly found in Civil Code, §§ 2415, 2420, 2423 and 2424 respectively.

In Cotten v. Perishable Air Conditioners, 18 Cal.2d 575, 577, 116 P.2d 603, 604, 136 A.L.R. 1068, the court said: "In general a dissolution operates only with respect to future transactions; as to everything past the partnership continues until all pre-existing matters are terminated [citations]. The dissolution does not destroy the authority of a partner to act for his former associates in matters in which they still have a common interest and are under a common liability [citations]."

In McNeny v. Touchstone, 7 Cal.2d 429, 437, 60 P.2d 986, 990, the court said: "Besides, the commission accruing from the transactions enumerated in said dissolution agreement was partnership property of the old firm. It is true that the old firm had been dissolved, but the partnership character of the property continued until the interest of the partnership therein was terminated. Section 2424, Civ.Code; Citizens Nat. Trust & S. Bank v. McNeny, 10 Cal.App.2d 488, 52 P.2d 492."

In Osment v. McElrath, 68 Cal. 466, 469, 9 P. 731, 733, the court said: "The business was intrusted to the firm, and it was the duty of both parties to conduct it to an end. This duty they owed to the clients and to each other, and it continued after the dissolution as to all unfinished business."

See, also, Page v. Summers, 70 Cal. 121, 128, 12 P. 120 and Yahr-Donen Corporation v. Crocker, 80 Cal.App.2d 675, 678, 182 P.2d 209.

[2] Appellant's contention that the business which he handled and concluded during the "winding up period" ($12,013.38) was his own and that the business which respondent handled and concluded during the same period ($2,315.05) was *his* own, does not square with these rules. All the business had come into the office as firm business and both partners remained obligated until it had been completed and, accordingly, the provisions of paragraph 4 remained in effect until the last loss was adjusted, whether handled by appellant or respondent. The court's action, in our opinion, was correct on this, the main phase of the litigation.

After awarding the $5,115.47, the judgment awards interest thereon at 7% per annum from June 30, 1946. This comes to $1,521.85.

The evidence shows that the "winding up period" extended into March of 1948 which was some eight months after suit was commenced and almost two years after the time at which the judgment started the running of interest. To put it another way, June 30 (or July 5) 1946, was the time when liquidation started and the accounting shows that there was business then on hand which, as it turned out, produced earnings of $14,328.43. That amount, however, did not become settled or determined until the court stated the account at the end of the trial, which was *almost four years after interest was made to run* by the terms of the judgment.

In support of this allowance of interest respondent relies on Bowman v. Carroll, 120 Cal.App. 309, 7 P.2d 734, 736, which states the general rule as follows: "The general rule regarding interest upon partnership accounts is stated in 47 Corpus Juris, page 1182, § 876, to be as follows: 'Ordinarily interest is not allowed on unascertained balances remaining in one partner's hands after dissolution of the firm. But where the circumstances are such as equitably demand payment of interest, it will be allowed from the time when the partnership accounts should have been settled, as where one partner has retained the money an unreasonable time, or where he is wrongfully withholding it.'" It should be noted that interest was allowed there from the date of the filing of the complaint, while here it was allowed from a date *a whole year before the complaint was filed.* There the court justified the allowance of interest as follows: "These properties were in defendant's name, and she sold them and kept the entire proceeds, denying the partnership and all liability. Respondent was forced into two trials in the superior court, and two appeals, and more than six years have elapsed since the complaint was filed. In the books which appellant kept, where she referred to one parcel, the words 'W. J. Bowman (respondent herein) owns one-half interest' were stricken out. An entry in respect to another parcel was similarly 'corrected' by appellant. The allowance of interest as made by the court was equitable, just and proper under such circumstances."

[3] The four factors which appealed to the court's sense of equity in that case were (1) defendant sold partnership assets and kept the proceeds; (2) she denied the existence of the partnership and all liability thereunder; (3) she prolonged the litigation, see Bowman v. Carroll, 91 Cal. App. 56, 266 P. 840, and (4) she altered book entries which had admitted plaintiff's partnership interest. None of these factors nor anything approaching them, appear here, and respondent has not attempted to point out any conduct of appellant which

would make this case an exception to the well-settled rule which Bowman v. Carroll itself recognizes. No other case than that is relied on, and it, we think, is clearly distinguishable.

The findings, conclusions of law, and judgment should be amended by striking from each thereof the provision following the award of $5,115.47, to wit: "together with interest thereon at the rate of seven (7) per cent per annum from June 30, 1946".

As so modified the judgment is affirmed, without costs to either party.

NOURSE, P. J., and DOOLING, J., concur.

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114 Cal.App.2d 468

In re WILSON'S ESTATE.

BREWER et al. v. KING.

Civ. 19114.

District Court of Appeal, Second District,
Division 1, California.
Nov. 28, 1952.

Proceedings in the matter of an estate, wherein objections were made to the accounting of the executors. From an order of the Superior Court, Los Angeles County, Ralph K. Pierson, J., dismissing the objections, the contestants appealed. The District Court of Appeal, Second Appellate District, Patrosso, J. Pro Tem., held that a person who had instituted suit to quiet title to property comprising principal asset of the estate was not a "person interested in the estate" within the probate code and, as such, entitled to be heard in opposition to the account.

Order affirmed.

1. Executors and Administrators 🔑504(2)

A plaintiff in pending suit to quiet title and declare a trust in real property comprising principal asset of an estate was not a "person interested in the estate" entitled under probate code to be heard in opposition to executors' account. Probate Code, § 927.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested In The Estate".

2. Executors and Administrators 🔑504(2)

The fact that plaintiff in suit to quiet title to property constituting principal asset of an estate also made claim to damages and to rents, issues and profits of property did not make such person a "person interested in the estate" entitled to be heard in opposition to executors' account. Probate Code, § 927.

3. Executors and Administrators 🔑459

Where plaintiff in suit to quiet title to property of estate sought to be heard in opposition to executors' account for purpose of deferring accounting until termination of the litigation, court, even if settling of account in advance of termination of litigation was a discretionary matter, did not abuse discretion in refusing to defer the accounting.

4. Executors and Administrators 🔑507(2)

Pendency of application for order requiring executors to furnish bond had no relation to hearing upon executors' account and was not ground for continuance of hearing.

◆

Cuthbert J. Scott and Benjamin D. Brown, Los Angeles, for appellant.

Walter G. Danielson and Garvin F. Shallenberger, Los Angeles, for respondents.

PATROSSO, Justice Pro Tem.

This is an appeal by Gladys King as administratrix with the will annexed of the Estate of George W. King, deceased, from an order settling the first account and report of the executors in the above-named estate which was made following an order dismissing appellant's objections thereto.

[1] The question presented is whether appellant is a "person interested in the estate" within the meaning of Probate Code, sec. 927, and as such entitled to be heard in opposition to the account. Appellant's in-

terest in the estate, if any, rests solely upon the fact, as set forth in her objections, that she had instituted suits which are pending and undetermined to quiet title and declare a trust in all of the real property described in the inventory, which real properties comprise all of the assets of the estate except an automobile and some miscellaneous household furniture.

A substantially similar question has but recently been the subject of intensive consideration by our Supreme Court in the Estate of Dabney, 37 Cal.2d 672, 234 P.2d 962. There the appellants had filed objections to three separate petitions for ratable distribution upon the ground that they had instituted and that there was then pending a suit in equity wherein they sought establishment of constructive and resulting trusts, the quieting of adverse claims to their asserted title, an accounting, an injunction and other relief, all based upon the allegations of their equitable ownership in properties inventoried as assets of the estate. The trial court dismissed appellants' objections and entered orders granting the petitions for distribution as prayed for. From these orders an appeal was taken, and in an elaborate opinion in which all of the authorities upon the subject are considered and discussed the court held that the appellants were not persons interested in the estate and dismissed their appeal.

While this decision would appear to be controlling here and require an affirmance of the order appealed from, appellant seeks to escape the force thereof by the assertion that in its opinion the Supreme Court "showed a marked disposition toward enlargement of the included class ('persons interested') and by its reference to Estate of Ricaud, 57 Cal. 421, and Estate of King, 199 Cal. 113 [248 P. 519], indicated its intention to give some measure of relief if and when, as here, the facts warranted such intervention." We read no such intention in the court's opinion. On the contrary, the court there rejected a substantially similar argument and in so doing used the following language 37 Cal.2d at page 682, 234 P.2d at page 969:

> "In respect to the argument of appellants that we should in the interests of justice give extended inclusion to the phrase 'persons interested in the estate,' to the end that persons situated like appellants shall not be deprived of effectual judicial aid, we point out that from our holding it does not follow that appellants are left without adequate remedy. While they are not 'persons interested in the estate' as such, they do claim an interest *in the assets* inventoried by the estate. They are asserting that interest in their suit in equity seeking, among other remedies, injunctive relief. It has been said 'Courts of equity will interfere in the administration of estates where the powers of the courts of probate and their modes of procedure preclude them from doing complete justice and then only for the purpose of rendering indispensable aid to courts of probate, remitting their decrees to that court to be carried into effect.' (Estate of Rolls (1924), 193 Cal. 594, 599, 226 P. 608; see also Brown v. Superior Court (1949), 34 Cal.2d 559, 565, 212 P.2d 878.) It is not proper on this appeal to consider what form the equitable relief, if any be merited, could or should take. We must here presume that the equity court could afford appellants any relief to which they showed themselves entitled and that it has acted, or will act, in conformity with law and equity on the showing made. Furthermore, the record on the distribution hearings indicates that the probate court was mindful of the equity suit (including the request for injunctive relief) pending in the superior court which might, if the latter court acting lawfully and within its jurisdiction so determined, require postponement of the distributions."

There is some suggestion in appellant's briefs that the Dabney case may also be distinguished by reason of the fact that there the pending litigation affected only a portion of the assets of the estate (approximately twenty-five to fifty per cent) while here, as in the Estate of Ricaud, 57 Cal. 421, upon which appellant relies, all of the real estate is involved in appellant's pending suits. It is true that in the course of its opinion in the Dabney case the Supreme Court in discussing the Estate of Ricaud makes mention of this fact, but we fail to find anything therein to suggest that a different result would have followed if a like situation had been presented there. If, as the Estate of Dabney and the many authorities cited therein unite in declaring, one asserting an adverse interest to properties inventoried as assets of an estate is not a person interested therein as those words are used in various sections of the Probate Code, the extent of the adverse claim would appear to be a matter of no consequence. The lack of necessary interest arises from the nature of the claim and not the extent thereof. This is made evident by the Estate of Dutard, 147 Cal. 253, where the court says at page 256, 81 P. 519, at page 520: "So far as these claimants are concerned, it is apparent that the claimants were not seeking to enforce any claim against property of the decedent. The claimants proceeded entirely upon the theory that the property held by Hyppolite Dutard in his lifetime, and by his legal representatives after his death, which was sought to be recovered, was in fact trust property, and did not belong to his estate at all. The claimants did not assume to stand in the character of creditors of the decedent, seeking to enforce a debt of the decedent against his property, but purely in the attitude of persons seeking to recover from the representatives of the estate specifically described property, upon the ground that it did not belong to the estate, but was in fact their own property. *The fact that the claim in question not only asked for the property itself, but also, in the alternative, for its value, did not change their character or alter the position of the claimants.*

"It is well settled that one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate, within the meaning of the property law." (Emphasis added.)

[2] The language of the court quoted above also effectively disposes of appellant's further contention that she occupies a status of a person interested in the estate by reason of the fact that in her pending suits she makes claim to damages in the alternative if recovery of the real property can not be had as well as to the rents, issues, and profits thereof. A similar situation was likewise present in the Estate of Dabney where incidental relief by way of an accounting was sought but this failed to persuade the court to accept appellants' claim that they were thereby entitled to be considered as persons interested in the estate.

[3] All of the authorities which we have discussed above involve appeals from orders or decrees of distribution but if, as they hold, an adverse claimant to property sought to be distributed may not be heard in opposition to a petition for the distribution thereof, manifestly stronger reasons are to be found for a like conclusion where such a claimant asserts the right to be heard in opposition to a current account. Here appellant's objections to the account are based solely upon the fact of the pendency of the litigation which she has instituted. She does not undertake to challenge the propriety of the disbursements for which credits are claimed therein but objects thereto only because they were paid from the rents, issues, and profits of the properties which are the subject of her pending suits. What she would have the court do is to defer any accounting until after the termination of the litigation, but the administration of the estate can not thus be brought to a standstill. The properties are income producing and of necessity require maintenance and supervision involving expenditures which may be met only from the income derived therefrom. If, therefore, it were to be conceded, as appellant contends, that the settling of the account in advance of the termination of the litigation was a matter resting in the court's discretion, it committed no abuse thereof in refusing to defer the same.

[4] Likewise without merit is appellant's final contention that the court was guilty of an abuse of discretion in denying her motion for a continuance of a hear-

ing upon the account. The only reason assigned for this request was that there was pending and set for hearing at a later date an application by appellant for an order requiring the executors to furnish bond. How this matter had any relation to the hearing upon the account is not apparent, and we see no error in the court's action.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

114 Cal.App.2d 389

HOLMES et al. v. SAUNDERS.

Civ. 15099.

District Court of Appeal, First District, Division 2, California.

Nov. 26, 1952.

Action for conversion of an automobile. The Superior Court, City and County of San Francisco, Twain Michelsen, J., entered judgment favorable to plaintiffs, and defendant appealed. The District Court of Appeal, Dooling, J., held that where plaintiffs purchased from defendant for $1 consideration a six months subscription to a periodical and honorary membership in an association and the subscription was evidenced by numbered ticket which entitled the plaintiffs to an automobile if the number of plaintiffs' ticket were drawn and the number of plaintiffs' ticket was drawn, and they were declared to be winners of the automobile, plaintiffs' cause of action depended upon their success in a lottery, which was a criminal offense, and hence plaintiffs were not entitled to maintain the action in the courts.

Reversed.

1. Lotteries 🔑3

The consideration to make a transaction a lottery need not be paid exclusively for the chance to win the prize, but it is sufficient that the consideration be paid for something else and the chance to win the prize. Pen.Code, § 319.

2. Lotteries 🔑3

Under statute prohibiting any scheme for the disposal or distribution of property by chance, court will inquire not into the name, but into the game, however skilfully disguised, in order to ascertain if it is prohibited. Pen.Code, § 319.

3. Lotteries 🔑15

Where plaintiffs for $1 purchased from defendant six months subscription to periodical and honorary membership in association, and subscription was evidenced by numbered ticket delivered to plaintiffs entitling them, if their ticket were drawn, to automobile, and plaintiffs' ticket was drawn and they were declared to be winners of the automobile, plaintiffs' cause of action for conversion of the automobile was based upon plaintiffs' success in a lottery, which is a criminal offense, and plaintiffs were not entitled to maintain the action in the courts. Pen.Code, § 319.

4. Appeal and Error 🔑800

Respondents' motion to dismiss appeal for appellant's tardiness in filing the record on appeal, which motion was made long after the record was actually on file, would be denied.

◆

Bruce McMullen, San Francisco, for appellant.

Schofield, Hanson & Jenkins, John W. Bussey, San Francisco, for respondents.

DOOLING, Justice.

This is an appeal on the judgment roll alone from a judgment for damages for the conversion of an automobile. The second amended complaint contains the following allegations:

> "That * * * defendants * * * offered to subscribers to the Associated Bulletin, during its circulation drive, for a consideration of One ($1.00) Dollar paid for a six months subscription thereto, delivery of the Associated Bulletin for the period of six months and honorary membership in the Associated Clubs of California, Inc., said subscription being evidenced by a numbered ticket then delivered to

> the subscriber, and entitling the holder, and subscriber aforesaid, of the numbered ticket drawn at the Oakland Auditorium Arena on a certain date therein named * * * to One (1) Buick Sedan Automobile * * *."

This is followed by allegations that plaintiffs became subscribers by the purchase of a numbered ticket, that the number of their ticket was drawn and they were declared to be winners of the Buick automobile and thereupon became its owners. All of these allegations were found to be true by the trial court.

Section 319 of the Penal Code provides:

> "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it * * *."

The allegations above quoted from the second amended complaint, which the court found to be true, might have been drawn with this definition in mind. The scheme as pleaded and found is one "for the disposal of property", a Buick automobile, "by chance", the drawing of a number, "among persons who have paid * * * valuable consideration", one dollar.

[1, 2] The consideration to make such a transaction a lottery need not be paid exclusively for the chance to win the prize. It is sufficient that the consideration, as here, be paid for something else and the chance to win the prize. People v. Gonzales, 62 Cal.App.2d 274, 144 P.2d 605; People v. Miller, 271 N.Y. 44, 2 N.E.2d 38; and see the many cases collected in the notes in 48 A.L.R. 1115; 57 A.L.R. 424; 103 A.L.R. 866; 109 A.L.R. 709; 113 A.L.R. 1121. It is said in 34 Am.Jur. 650 "that no sooner is the term 'lottery' defined by a court, than ingenuity evolves some scheme within the mischief discussed, although not quite within the letter of the definition given; but an examination of the many cases on the subject will show that it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery laws * * *. The court will inquire, not into the name, but into the game, however skilfully disguised, in order to ascertain if it is prohibited * * *."

Under the pleadings and findings there was no element of gratuity in this particular transaction so that cases such as People v. Cardas, 137 Cal.App. 788, 28 P.2d 99, where free chances were widely given away without consideration, are not in point.

[3] Since plaintiffs' cause of action depends on their success in a lottery, which is a criminal offense, the doors of the courts are closed to them. 6 Cal.Jur., Contracts, sec. 106, pp. 150–152.

[4] Respondents' motion to dismiss the appeal for tardiness in filing the record on appeal was made long after the record was actually on file and is denied on that ground. Steiner v. Davis, 21 Cal.App.2d 334, 69 P.2d 184. The judgment is reversed.

NOURSE, P. J. and GOODELL, J., concur.

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114 Cal.App.2d 461

BUCK et al. v. MORROSSIS.

Civ. 15240.

District Court of Appeal, First District,
Division 1, California.
Nov. 28, 1952.

Unlawful detainer action. The Superior Court, City and County of San Francisco, Clarence W. Morris and Robert McWilliams, JJ., entered default judgment for plaintiffs and awarded treble damages, and defendant appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that the evidence that defendant's holding over after termination of the lease was deliberate, intentional and obstinate supported the award.

Affirmed.

1. Appeal and Error ⚷103

Order striking defendant's demurrer was not independently appealable, but was reviewable, if at all, on appeal from judgment entered upon defendant's default.

2. Forcible Entry and Detainer ⚷26

Court in unlawful detainer action had discretion to strike untimely demurrer from files. Code Civ.Proc. §§ 1167, 1169, 1170.

3. Appeal and Error ⚷854(3)

Where motion is made on several grounds and is granted by order without specification of grounds, order must be affirmed if one valid ground exists, and therefore where motion to strike demurrer from files was based on late filing of demurrer and on ground that demurrer was a sham and frivolous, order striking demurrer would be affirmed, though trial court had no power to strike the demurrer on the ground that it was a sham and frivolous. Code Civ.Proc. §§ 1167, 1169, 1170.

4. Judgment ⚷114

Record on appeal from default judgment in unlawful detainer action showed no act of landlords upon which waiver or estoppel to enter default could be predicated. Code Civ.Proc. §§ 1167, 1169, 1170.

5. Appeal and Error ⚷865

Ordinarily sufficiency of evidence to support judgment cannot be raised by one appealing from default judgment.

6. Judgment ⚷112

A default only admits those facts that are well pleaded, and therefore even a defaulting party may challenge sufficiency of a complaint.

7. Landlord and Tenant ⚷291(8)

Complaint in unlawful detainer action sufficiently alleged sub-tenancy where it alleged existence of original lease, its assignment with consent to another, and entry into possession of defendant under the assignee.

8. Landlord and Tenant ⚷94(2)

A subtenant's right to possession terminates with his lessor's leased term, and subtenant in such a case is not entitled to notice, in view of fact that no notice need be given at end of a fixed term.

9. Appeal and Error ⚷865

On appeal from default judgment in unlawful detainer action, every reasonable intendment must be indulged in support of the complaint, and such complaint will be sufficient if its direct averments necessarily imply an inference of facts necessary to remedy what otherwise might be a defect.

10. Appeal and Error ⚷865

Defects which may be questioned only by special demurrer or motion cannot be relied upon on appeal from default judgment.

11. Landlord and Tenant ⚷291(14)

In unlawful detainer action, evidence supported award of treble damages for deliberate, intentional and obstinate holding over after termination of lease. Code Civ.Proc. §§ 735, 1174.

12. Landlord and Tenant ⚷291(14)

Award of treble damages in unlawful detainer action for deliberate, intentional and obstinate holding over after termination of lease could not be supported by evidence that defendant's attorney stated that defendant intended to hold over while litigation was pending, in absence of evidence that defendant authorized such attorney to make such statement. Code Civ. Proc. §§ 735, 1174.

◆

Albert E. Polonsky, San Francisco, for appellant.

Norman A. Eisner and Haskell Titchell, San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Plaintiffs, as the owners and lessors of business property, brought this action in unlawful detainer and for damages against defendant as the subtenant in possession, and against others not involved on this appeal. Defendant defaulted and judgment was entered decreeing restitution awarding $1,559.52 as treble damages for the unlawful detention computed at

$650 per month and fixing $64.98 a day as damages for any additional holding over. Defendant appeals not only from the judgment, but also from an order striking his demurrer from the files. This order is not independently appealable, but is reviewable, if at all, on the appeal from the judgment. Cuddahy v. Gragg, 46 Cal. App. 578, 189 P. 721. The appeal from the order should be dismissed. On the appeal from the judgment defendant does not challenge the portion of the judgment decreeing restitution, nor does he make any claim of right to any tenancy in the premises.

The complaint alleges that on August 20, 1946, plaintiffs leased the premises to one Cator for five years, expiring August 19, 1951; that on May 22, 1947, plaintiffs, in writing, consented to an assignment of the lease to one Hirsch, also named as a defendant, but later dismissed as a party; that defendant thereafter entered into possession of the premises under Hirsch; that the term of the lease had terminated; that defendant thereafter continued in possession without permission of plaintiffs and contrary to the terms of the lease; that plaintiffs had entered into a new lease with third parties at an increased rental whereby they were required to deliver possession of the premises to the new tenants on August 20, 1951; that on April 10, 1951, plaintiffs had served a written notice on Hirsch that his lease would not be renewed and that he must vacate on or before August 19, 1951; that on August 3, 1951, a similar notice was served upon both Hirsch and defendant; that on August 7, 1951, plaintiffs' attorney was notified that defendant had no intention of vacating the premises on the termination date of the lease but intended to remain in possession during the period of any litigation brought to evict him; that defendant "deliberately, intentionally, obstinately and maliciously" retains possession of the premises "with full knowledge that the term has terminated and that the holding over is against the will and without the consent of plaintiffs." The prayer is for attorneys' fees, not awarded in the judgment, a reasonable rental value of $1,000 per month, restitution, loss of profits and treble damages.

This complaint was filed and served on defendant on August 21, 1951. On September 4, 1951, fourteen days later, defendant filed a general and special demurrer. The very next day plaintiffs moved to strike the demurrer on the grounds that it was filed too late, and that it was sham and frivolous. This motion was supported by an affidavit of plaintiffs' counsel repeating most of the allegations of the complaint and further deposing that defendant's counsel, after the notice of August 3, 1951, had been served, informed affiant that defendant had no intention of surrendering possession on the termination date of the lease because defendant knew he could remain in possession during the period any litigation brought to evict him was pending. It is further averred that after August 21, 1951, the two lawyers had worked out a compromise whereby defendant would be granted an extra month's tenancy at an increased rental on condition that at the end of that time defendant would submit to entry of judgment against him; that defendant evaded giving his approval to this compromise, secured new counsel, and rejected the compromise by filing the challenged demurrer.

On September 11, 1951, the trial court, without designation of the reason therefor, granted the motion to strike the demurrer from the files, and ordered the default of defendant entered. Judgment was entered September 13, 1951. The judgment recites the entry of the default, declares that the demurrer was stricken "upon the grounds that it was not filed within time," recites that evidence was taken, decrees restitution, and awards $1,559.52 treble damages for the unlawful detention of said premises, a fixed amount for each additional day of detention, and costs.

[2] It is first urged that the trial court was without power to strike the demurrer from the files. The contention is entitled to but scant consideration. Assuming, without deciding, that defendant can raise this point after he has defaulted, under the law, Code of Civil Procedure, §§ 1167, 1169 and 1170 in an unlawful detainer action the defendant has but three days

after service of summons to demur or answer the complaint. Here the demurrer was not filed for fourteen days, which was eleven days too late. Appellant concedes that the demurrer was filed late, but contends that if there is a pleading on file, even a pleading filed late, it is error to enter a default while that pleading is on file. That is probably the law. Cuddahy v. Gragg, 46 Cal.App. 578, 189 P. 721. But the further contention that in such an action the court lacks power to dispose of the pleading by striking it from the files because filed late is unsound. In Cuddahy v. Gragg, 46 Cal.App. 578, at page 580, 189 P. 721, at page 722, the court disposed of the contention as follows: "But while it is true that a defendant's default may not be entered until his demurrer or other pleading, though filed after the time permitted by law, has been disposed of, nevertheless it is a proper practice in such case to move to strike the pleading from the files. The plaintiff has no absolute right to have the pleading stricken from the files merely because it was not filed in time; and, on the other hand, the defendant has no absolute right to have his belated pleading remain in the files; for a defendant cannot, *as of right*, answer or demur after the expiration of the time prescribed by statute. It is a proper practice, therefore, for the plaintiff to move to strike the pleading from the files; and, in the exercise of a sound discretion, the court very properly may grant such motion to strike. [Citing cases.]"

This has been the rule in California for many years. Bowers v. Dickerson, 18 Cal. 420; Acock v. Halsey, 90 Cal. 215, 27 P. 193. Appellant contends that the holdings in these cases are dicta and should not be followed. We need not take the time to demonstrate the fact that the holding in at least the Cuddahy case was not dicta, but are content to hold that if such holdings were dicta they are sound dicta and should be followed. It would be a logical absurdity to hold that a defendant in such an action which, under the law is entitled to priority, and where speedy determination is essential, could stall the proceedings and engage in dilatory tactics by the simple device of filing a late demurrer.

[3] Appellant also urges that the trial court had no power to strike the demurrer on the ground that it was sham and frivolous. It has been so held. Larco v. Casaneuava, 30 Cal. 560. If it be assumed that the rule of that case is sound, it has no application here. The motion to strike was here based on the late filing of the demurrer and on the ground that it was sham and frivolous. The order granting the motion does not specify the ground upon which it was granted, but the judgment recites that the motion was granted "upon the grounds that it was not filed within time." Even if the judgment cannot be used to explain the order, the order, standing alone, would have to be affirmed if it can be sustained on any of the grounds urged in the motion. Republic Truck Sales Corp. v. Peak, 194 Cal. 492, 229 P. 331; Fox v. Townsend, 149 Cal. 659, 87 P. 82. Those cases hold that where a motion is made on several grounds and is granted by an order which does not specify the grounds, it must be affirmed if one valid ground exists upon which it could have been granted. That rule applies here.

[4] Appellant also contends that his default should not have been entered because the record shows negotiations were pending for a settlement after the time within which a demurrer lawfully could be filed had elapsed. It is urged that this fact in some way amounted to a waiver of the right to enter a default. The record does not show that the negotiations referred to were instituted or continued at the request of the respondents, but, on the other hand, the record does show that these negotiations, after a tentative settlement had been agreed to, failed because appellant stalled for time and then, after he had retained new counsel, refused to sign the agreement and filed the demurrer. There is no act of respondents shown by the record upon which to predicate a waiver or estoppel.

[5–10] Appellant next attacks the sufficiency of the complaint. He also attacks the sufficiency of the evidence, a point that normally cannot be raised by one appealing from a default judgment. Lester v. Beer, 74 Cal.App.2d Supp. 984, 168 P.2d 998. But, even a defaulting party may challenge the sufficiency of a complaint, because the default only admits those facts that are well pleaded. Williams v. Foss, 69 Cal.App. 705, 231 P. 766. Appellant contends that the complaint is insufficient because, so it is claimed, it does not allege the nature of the tenancy of appellant, and contends that if appellant is a tenant at will or for a term he is entitled to notice, and if a trespasser, no cause of action has been pleaded. The complaint is sufficient. It alleges the existence of the original lease, its assignment with consent to Hirsch, and then alleges that appellant entered into possession under Hirsch. This was a sufficient averment of a subtenancy. The subtenant's right to possession terminates with the leased term of his lessor—in this case with the termination of the five-year master lease. Herman v. Campbell, 86 Cal.App.2d 762, 195 P.2d 801. The subtenant in such a case is not entitled to notice, because no notice need be given at the end of a fixed term. Camp v. Matich, 87 Cal.App.2d 660, 197 P.2d 345; Black v. Black, 77 Cal.App. 82, 246 P. 90. In such an action, on appeal from a default, every reasonable intendment must be indulged in support of the complaint, and it will be sufficient if its direct averments necessarily imply an inference of the facts necessary to remedy what otherwise might be a defect. Defects which may be questioned only by special demurrer or motion cannot be relied upon on an appeal from a default judgment. Lester v. Beer, 74 Cal.App.2d Supp. 984, 168 P.2d 998; 3 Freeman on Judgments, p. 2698.

The last major contention of appellant is that the trial court erred in allowing treble damages, it being contended that such award was not justified by the evidence. Under the statutes, §§ 735 and 1174, Code of Civil Procedure, the trial court in an unlawful detainer action may award, in a proper case, treble damages, but the statutes do not define the circumstances under which such an award can be made, but the cases have held that such award is only permissible when the evidence shows that the holding over is deliberate, intentional and obstinate. Field v. Walton, 94 Cal.App. 596, 271 P. 500; Gwinn v. Goldman, 57 Cal.App.2d 393, 134 P.2d 915.

[11, 12] Respondents contend that the evidence disclosed by the record shows a deliberate, intentional and obstinate withholding as pleaded in the complaint, and further contend that, this being an appeal from a default judgment, and the trial court having awarded treble damages after declaring that evidence had been offered "in support of all the allegations" of the complaint, the appellant cannot attack the sufficiency of the evidence. Fitzgerald v. Herzer, 78 Cal.App.2d 127, 177 P.2d 364; Crackel v. Crackel, 17 Cal.App. 600, 121 P. 295. It is doubtful whether this rule applies to damages. Richee v. Gillette Realty Co., 97 Cal.App. 365, 275 P. 477. In such cases, in spite of the default, it would seem that the court is under a duty to inform itself of the amount of unliquidated damages. But we are convinced that the evidence here existing supports the award of treble damages. Appellant contends that the only evidence of his willfullness in holding over is to be found in the evidence that defendant's lawyer stated that appellant could hold over while litigation was pending and intended to do so, and claims that there is no evidence that he authorized his attorney to make such a statement. We agree with the appellant that these declarations, there being no evidence of knowledge of or authorization by appellant, cannot be relied upon to support the award of treble damages, but we disagree with appellant's contention that this is the only evidence from which the trial court could find that the holding over was willful. The whole record demonstrates a deliberate attempt on the part of appellant to hold over after termination of the lease under which he was holding. Appellant had actual notice served upon him on August 3, 1951, informing him that he must get out by August 19, 1951. This he failed to do. When sued in this action he made no defense on the merits, and made no claim of right to the premises. He, in fact, defaulted, thus admitting all of the facts pleaded in the complaint. He tried to stall the entry of his default, commenced negotiations for a settlement, evaded as long as he could giving a definite answer to the agreement en-

tered into by his counsel, and then substituted that counsel out of the case, and filed a demurrer. The evidence also shows that appellant was very desirous of staying in the premises during the Christmas season, and offered $1,000 a month for a limited lease. The inference is plain that this failing, he employed the tactics here described in order to retain possession of the premises after his lease had terminated. Such facts certainly support a reasonable inference that the holding over was deliberate, intentional and obstinate.

The appeal from the order striking the demurrer is dismissed; the judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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114 Cal.App.2d 450

MASTERS MART, Inc. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 19307.

District Court of Appeal, Second District, Division 3, California.
Nov. 26, 1952.

Original proceeding in certiorari to review and annul in part a judgment adjudging petitioner in contempt. The District Court of Appeal, Vallée, J., held that certiorari would not lie where record disclosed no lack of proof of jurisdictional facts.

Writ discharged and proceeding dismissed.

1. Contempt 🔑67

Certiorari would not lie to review judgment adjudging petitioner in contempt, where record disclosed no lack of proof of jurisdictional facts.

2. Contempt 🔑67

The sole function of the writ of certiorari in a contempt matter is to annul proceedings which have been taken in excess of jurisdiction.

3. Contempt 🔑67

In certiorari proceeding to review and annul judgment adjudging petitioner in contempt, court will not review evidence in so far as it applies to the merits of the case, but only to ascertain whether there was proof of jurisdictional facts.

E. A. Oppenheim and Joseph A. Wapner, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Kean & Ingram and Bernard E. Ingram, Los Angeles, for real party in interest.

VALLÉE, Justice.

Original proceeding in *certiorari* in which petitioner seeks a review and annulment in part of a judgment adjudging petitioner in contempt.

On November 1, 1950, a judgment was entered which enjoined petitioner from selling, offering or advertising for sale, any Sunbeam commodity at prices less than the prices then stipulated in Sunbeam Corporation's fair trade contract. The fair trade contract was made part of the judgment. The minimum sales price fixed in the contract for one Sunbeam Automatic Coffeemaster was $32.50.

Thereafter, petitioner was cited for contempt. The charge was that it had sold various Sunbeam commodities at prices less than the prices stipulated in the contract. At the hearing, the matter was submitted on a stipulation of facts between petitioner and Sunbeam. The court found petitioner guilty of seven violations of the injunction and imposed a fine for each violation.

The petition alleges that at the hearing, the parties stipulated that petitioner sold five Sunbeam Automatic Coffeemasters for the price of $19.50 each at the same time, in one transaction, to one company, on a date prior to December 27, 1951. The answer of respondent denies this allegation.

Petitioner contends that the sale of the five Coffeemasters constituted one and not five violations of the injunction, and that therefore the court acted in excess of its jurisdiction in imposing a fine for the five violations. No question is raised as to the other two violations.

[1] In view of the record, we cannot reach the question raised by petitioner. There is nothing before us to establish that the parties stipulated as alleged in the petition. The most the record shows is a stipulation that there had been "sales" by petitioner of five Coffeemasters to one party for the price of $19.50 each.

[2, 3] The sole function of the writ of *certiorari* in a contempt matter is to annul the proceedings which have been taken in excess of jurisdiction. 4 Cal.Jur. 10 Yr.Supp. 31, § 50. The court will not review the evidence in so far as it affects or applies to the merits of the case, it can be considered only for the purpose of ascertaining whether there was proof of jurisdictional facts. Strain v. Superior Court, 168 Cal. 216, 223; 142 P. 62. There is nothing before us to show that there was no proof of the jurisdictional facts with respect to the five violations.

The writ heretofore issued is discharged. The proceeding is dismissed.

SHINN, P. J., and WOOD, J., concur.

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114 Cal.App.2d 371

GERARDO v. GERARDO.

Civ. 4454.

District Court of Appeal, Fourth District, California.

Nov. 25, 1952.

Action by husband for divorce. The Superior Court, Riverside County, O. K. Morton, J., entered a decree of divorce, and from portion of judgment awarding custody of minor child and certain property to plaintiff, defendant appealed. The District Court of Appeal, Griffin, J., held that wife was entitled to be served with copy of complaint as amended after entry of default and an opportunity to be heard on the merits as to which party was a fit and proper person to have custody of child.

Portions of judgment appealed from reversed.

1. Judgment 🔑150

Where complaint is amended in matters of substance as distinguished from mere matters of form after the default of a defendant has been entered, the amendment opens the default and unless amended pleading is served on defaulting defendant, no judgment can be entered on the default.

2. Divorce 🔑104

Where complaint, as originally drawn and served on wife in husband's action for divorce, praying that custody of minor child be awarded to mother, was amended by interlineation by court after entry of default against wife and without notice to her, so as to allege that it would be for the best interests of child to be placed in custody of father and pray that custody be awarded to father, wife was entitled to be served with a copy of complaint as amended and opportunity to appear and answer and be heard on merits as to which party was a fit and proper person to have custody of child. Civ.Code, § 138; Code Civ.Proc. §§ 432, 472, 473, 580.

3. Divorce 🔑203

Where husband in action for divorce alleged and testified that there was no community property and complaint contained no prayer for an award of any property, portion of divorce decree awarding washing machine, baby bed, clothing and bedding to husband was unsupported by the evidence and must be reversed.

◆

J. David Hennigan, Riverside, for appellant.

Richard A. Fitzgerald, Riverside, for respondent.

GRIFFIN, Justice.

Plaintiff husband filed an action for divorce against defendant wife, alleging cruelty. He particularly alleged that there was no community property and so testified at the hearing. After an amendment by interlineation by the court, as hereinafter indicated, the complaint recited that the minor child, aged about two years,

> "* * * is now in the custody of
> the defendant ~~and that in view of the~~
> and
> ~~tender age of said child~~, it appears to
> be for his best interest and welfare to
> be placed plaintiff
> ~~remain~~ in the custody of ~~defendant~~ for
> the time being, subject to the right of
> defendant
> ~~plaintiff~~ to visit said child and have
> said child with him at reasonable
> times."

Plaintiff then prayed that the custody and control of the minor child "be awarded
plaintiff
to ~~defendant~~, with right of reasonable visitation and temporary custody from time
defendant
to time reserved to ~~plaintiff~~."

There is no prayer for an award of any property and no allegation that either party was or was not a fit and proper person to have custody of the child.

Defendant was duly served with process and a copy of the complaint as originally drawn. Apparently, being satisfied that plaintiff should obtain a divorce and that the custody of the child be awarded to her as prayed for therein, she defaulted. At the hearing, defendant not being present, testimony was taken. The evidence disclosed that defendant had two other children prior to her marriage to plaintiff (claimed by plaintiff to have been born out of wedlock), and that those children were awarded to the juvenile court.

Plaintiff testified that he was receiving total disability benefits from the Government amounting to $85.52 per month and that it was sending $32 of that amount to defendant for the support of the child; that prior to the separation plaintiff's wife worked and he cared for the child at times. When asked by the court if he could take care of it plaintiff answered: "That is up to you if you want me to have it", that he would live with his mother and stepfather in Casa Blanca and she "cook pretty well"; that defendant did not have a father or mother living here.

After hearing other evidence pertaining to the alleged cruelty, the court orally announced that the divorce would be granted and that the immediate custody of the child would be awarded to plaintiff. Counsel for plaintiff then, on January 15, 1952, announced he would prepare a decree accordingly and would send a copy to Washington so plaintiff would be able to obtain the full amount of his disability benefit.

At some stage of these proceedings, apparently after default was entered, and after the proceedings were had before the court, the trial judge, without notice to defendant, ordered the clerk to amend the allegations of plaintiff's complaint by interlineation, by striking out certain portions and adding other words, as heretofore indicated, so as to allege that it was for the best interests of the child that the plaintiff be awarded custody of it. On the following day the court entered an interlocutory decree of divorce and ordered that plaintiff have immediate custody of the child, subject to the right of visitation by defendant at reasonable times; and ordered that the washing machine, baby bed, all clothing, and bedding be awarded to plaintiff.

Defendant obtained an attorney and appealed from that portion of the judgment awarding custody of the child to plaintiff and awarding the property mentioned to him.

Subsequently, this court, after hearing a recitation of the merits of the appeal, and upon proper application and showing, granted a writ of supersedeas staying the execution of that part of the judgment pending appeal. A social worker of the Department of Welfare of that county made an affidavit showing that defendant was quite able to take proper care of the child. An affidavit of defendant recites that plaintiff was not a proper person to care for it because he struck and beat the child; that she found him black and blue and crying from a beating administered by the plaintiff; that when she returned home on one occasion she found the child tied to the bed in a "spread eagle position"; that plaintiff is drawing total disability pension for mental illness; that he is subject to attacks and while in the veteran's hospital "had been kept in a straight jacket".

It is appellant's contention (1) that the amendment of the complaint and prayer by the court was void; (2) the court had no power to grant relief beyond the scope of the pleadings; (3) the amendment was not proper even had it been served; (4) the judgment as to custody is not supported by the evidence; and (5) that this court should amend the decree and order it entered in accordance with the allegations and prayer of the complaint, as originally served on the defendant. It is also contended that the court was without jurisdiction to award the property to the plaintiff under the pleadings and evidence.

Plaintiff contends that the amendent was allowable where it was made to conform to the proof and facts in issue, and cites 21 Cal.Jur. p. 207, sec. 142. The cases referred to under the citation bear upon actions where the parties appeared and were before the court. He also cites Ex parte Gordan, 95 Cal. 374, 30 P. 561, in support of the judgment and claims that the court had jurisdiction of the child regardless of the pleadings and prayer, and under section 138 of the Civil Code could award the custody to any person without a finding or allegation as to fitness of the parties. In that action it should be noted that both parties appeared and contested the question of custody.

[1] It is well established law that where, after the default of a defendant has been entered, the complaint is amended in matters of substance as distinguished from mere matters of form, the amendment opens the default and unless the amended pleading be served on the defaulting defendant, no judgment can be entered on the default. Stack v. Welder, 3 Cal.2d 71, 43 P.2d 270. There is therefore presented the question of whether the amendment made by the court was an amendment of substance and whether the relief granted exceeded the relief sought by the allegations of plaintiff's original complaint and prayer for relief, and whether defendant had a right to rely upon the belief that no judgment would be entered in excess of or contrary to that sought.

[2] Although a motion to be relieved of default under section 473 of the Code of Civil Procedure may have been more appropriate, it does appear to us that the defendant should have been served with an amended complaint and afforded an opportunity to be heard, particularly where the amendments made by the court were so at variance with the pleadings and prayer, and where both plaintiff and defendant were apparently relying on the allegations of the complaint as originally served, and where both parties apparently believed that defendant, under such pleadings, would retain custody of the child and would continue to receive a portion of the disability benefit allowance for its care.

[3] That portion of the judgment awarding custody to plaintiff therefore should be reversed. A copy of the complaint with such amendments as are necessary, should be served upon defendant and she should be given an opportunity, within a reasonable time, to appear and answer, if she be so advised, to the end that a full hearing might be had on the merits as to which party is a fit and proper person, so that a proper order may be made as to custody. Sections 432, 472, 473, 580, Code Civ.Proc.; Knox v. Atchison, T. & S. F. Ry. Co., 95 Cal.App.2d 896, 214 P.2d 589; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64; Sec. 138, Civ.Code; Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333. The portion of the judgment awarding the property mentioned to plaintiff, under the pleadings as framed, is not supported by the evidence and must be reversed. Burtnett v. King, supra.

The portions of the judgment appealed from are reversed.

BARNARD, P. J., and MUSSELL, J., concur.

LYONS v. HOOVER.*

Civ. 8106.

District Court of Appeal, Third District, California.

Nov. 25, 1952.

Hearing Granted Jan. 22, 1953.

Petition by fireman's widow for writ of mandate against city official to compel the issuance of warrants to reimburse widow for alleged overdeductions from pension payments due her and the issuance of future warrants without deductions. The Superior Court, Sacramento County, John Quincy Brown & Van Dyke, JJ., gave judgment for defendant, and plaintiff appealed. The District Court of Appeal, held that where fireman's widow alone was entitled to pension under retirement system and the deceased fireman's children received three-quarters of death benefits payable under Industrial Accident Commission award, portion of the compensation award payable to the children could in no sense be considered as a double payment to the widow.

Reversed.

1. Municipal Corporations 🔑220(9)

Under charter provision that the Retirement Board shall be the sole authority under such general ordinances as may be adopted by the City Council to determine when members may receive benefits under the retirement system, the City Council was given authority to prescribe the policy of the Retirement Board but the Board was the only administrative agency and application of the general ordinances to specific cases was to be made under its sole authority.

2. Municipal Corporations 🔑220(9)

Under charter provision that allowances provided by contribution of city shall be reduced in manner fixed by City Council by the amount of any benefits payable under workmen's compensation, City Council has power to prescribe rules to guide the Retirement Board in making its determination of amounts to be deducted in any particular case coming within the scope of the provisions.

3. Municipal Corporations 🔑200(7)

Where city council adopted resolution calling for reduction of fireman's widow's pension from $75 to $3.69 a month until such deductions would equal workmen's compensation award it did not operate within the authority granted it by charter to prescribe rules to guide retirement board.

4. Municipal Corporations 🔑220(9)

Charter providing that pension allowances payable because of death of municipal employee should be reduced by amount of benefits payable on account of such person's death under workmen's compensation should be given liberal construction and one which would preserve the constitutionality of the legislation, if possible.

5. Municipal Corporations 🔑200(7)

Where fireman's widow was entitled to pension under retirement system but fireman's minor children were not entitled to any part of amount so payable and widow received one-fourth and children three-fourths of death benefits payable under workmen's compensation award, portion of the compensation award payable to the children could not be deducted from widow's pension, under charter provision that payments under workmen's compensation should be deducted from allowance under retirement system.

6. Municipal Corporations 🔑220(9)

Although pension plan of city could be modified, abrogations of one's rights thereunder could not be carried out under the guise of modification.

Archibald D. McDougall, James H. Phillips, Richard J. Lawrence, Sacramento, for appellant.

Everett M. Glenn, Anthony J. Kennedy, Sacramento, for respondent.

PER CURIAM.

This is an appeal by Margaret Lyons from a judgment denying her petition for a writ of mandate against A. O. Hoover, as Controller of the City of Sacramento, because of his refusal to pay her the sum of $2,481.87 as reimbursement for overdeduction from pension payments due her as the surviving widow of a former member of the fire department of said city and to issue future warrants without deduction.

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* Subsequent opinion 258 P.2d 4.

There is no dispute as to the facts, and, stated in chronological order, they are as follows:

Prior to September 4, 1941, appellant's deceased husband, James L. Lyons, was a member of the Fire Department of the City of Sacramento and a member of the Retirement System.

On September 4, 1941, Lyons retired and received, under the provisions of section 173(c) of the City Charter of Sacramento, a pension allowance of $112.50 per month. (Allowance for a person with 20 years of service or more who becomes disabled but not in line of duty.)

On August 15, 1942, James Lyons died and under section 173(d) of the Charter, appellant, as his widow was entitled to receive two-thirds of the $112.50 monthly retirement allowance paid to Lyons during his lifetime; i. e., $75 per month.

On August 25, 1942, appellant filed a claim with the Industrial Accident Commission founded on the claim that her husband's death was due to injuries sustained in the course of his employment as a city employee.

On April 29, 1943, the Industrial Accident Commission made an award in the sum of $5,910.71 in favor of appellant and her three minor children.

On June 4, 1943, the City Council of Sacramento adopted Resolution No. 211 authorizing reduction of the pension allowance being paid to the appellant in the amount of the city's contributions at the rate of $71.31 per month until the amount of the payments withheld should equal the total of compensation award.

On June 30, 1943, the Retirement Board adopted a resolution conforming to the action of the City Council reducing petitioner's retirement allowance by $71.31 per month; the sum of $3.69 to be paid monthly to appellant.

On May 10, 1947, appellant filed a petition with the Retirement Board to have pension allowance recomputed.

On January 27, 1948 appellant filed a supplementary petition to the May 10, 1947 petition, requesting that the amount of contributions to be withheld from pension payments be restricted to $1,440.18 or one-quarter of the Industrial Accident Commission award since the award was in favor of herself and the three minor children.

On February 19, 1948, the Retirement Board adopted a resolution authorizing a refund of $2,481.87 to Mrs. Lyons and requiring that the pension allowance after February 1, 1948 be in the sum of $75 per month.

The Controller refused to comply with this last designated action of the Board or to draw warrants therefor, and upon such refusal appellant filed the present action seeking a writ of mandate to compel the issuance of the warrants.

At the conclusion of the hearing the trial court found that the Board had no power to make its order of February 19, 1948, refunding to petitioner the amount previously deducted from the compensation award of the Industrial Accident Commission in excess of her one-quarter share thereof; that the act of the City Council of June 4, 1943, reducing the pension payment to her by the sum of $71.31 until the entire compensation award had been off-set, was a valid act within the provisions of the City Charter, and that the respondent Hoover properly refused to draw his warrant in favor of petitioner in the sum of $2,481.87.

It appears from the memorandum opinion of the trial court that the principal basis for its judgment denying petitioner any relief was the particular language used in the first paragraph of section 173(j) of the Charter. Said section reads as follows:

> "(j) That portion of any allowance payable because of the death or retirement of any such employee which is provided by contributions of the City shall be reduced, in the manner fixed by the City Council, by the amount of any benefits payable to or on account of such person, under the Workmen's Compensation, Insurance and Safety Law of the State of California.
>
> "It is the express intent that payments under said Workmen's Compen-

> sation Insurance and Safety Law shall be a deductible credit against any allowance under the Retirement System which is provided by contributions of the City payable to or on account of the death of any such person; that double payments in whole or in part, at the expense of the taxpayers, shall not be permitted."

Section 168 of the Charter provides in part:

> "The Retirement Board shall be the sole authority and judge under such general ordinances as may be adopted by the City Council to determine when members may receive and may continue to receive benefits of any sort under the retirement system, and shall have exclusive control of the administration and investment of such fund or funds as may be established, provided that all investments shall be of the character legal for insurance companies in California."

It is petitioner's first contention that the trial court erred in concluding that section 173(j) gave to the City Council sole jurisdiction and power to determine the question of refund, that to the contrary the Retirement Board continued to act as provided in said section 168, and that the jurisdiction, if any, given by said section 173(j) related solely to the "manner" by which deductions would be made as distinguished from the amount of the deduction.

[1] Thus, it would appear that the administrative policy of the retirement system as established under the provisions of section 168, the City Council was given the authority to prescribe "general ordinances" applicable to all cases, but these ordinances would be applied to specific cases under the "sole authority" of the Retirement Board. In other words the Retirement Board was made the only administrative agency or body involved in the administration of the retirement system but in the exercise of this function its activities could be controlled by "general ordinances" passed by the City Council prescribing the policy under which it would operate.

[2] Section 173(j) does not appear to change this administrative policy. Said section merely gives the City Council the power to prescribe rules to guide the Retirement Board in making its determination of the amounts to be deducted in any particular case coming within the provisions of the section, a power the City Council would probably have had even without this specific grant, due to their "general ordinance" powers under section 168. This interpretation is harmonious with the interpretation suggested as proper prior to the amendment. See Vero v. City of Sacramento E. R. System, 41 Cal.App.2d 482, 107 P.2d 82. Although we have discussed at length the phrase "in the manner fixed by the City Council" we find nothing therein which would change this interpretation.

[3] Turning now to what was done in the instant case: It would appear that the City Council did not operate within the authority granted it by section 173(j), since instead of prescribing a rule for the Retirement Board to follow in making its determination of the amount to be deducted from a pension allowance in a case coming within that section, the City Council acted by setting the specific amount to be deducted, a matter solely within the administrative function of the Retirement Board.

However, whether or not the City Council exceeded its authority in this respect is not now relevant because the deductions have been made and the point now before this court is the petitioner's right to receive a return of the amount deducted over and above that authorized by section 173 (j).

Since the petitioner has agreed to the deduction by the city of her portion of the award, any discussion of the right of the city so to do is likewise immaterial. Thus there remains but one question, the right of the city to deduct from the pension payable to petitioner the portion of the compensation award payable to the children.

Under the provisions of that award there was awarded to "Margaret Lyons, Marguerite Lyons, Kenneth Lyons and Edward C. Lyons, against City of Sacramento, of a death benefit and burial expense and disability indemnity in the total sum of $5,910.71."

Under the provisions of Labor Code, § 4703, "If there is more than one person wholly dependent for support upon a deceased employee, the death benefit shall be divided equally among them."

In the case of Vero v. City of Sacramento E. R. System, supra, a like contention was raised, and this court in answer thereto said, 41 Cal.App.2d at page 490, 107 P.2d at page 86:

> "Even if it be conceded that the board had the power to deduct the industrial award from the widow's pension, only one-half of the award could be affected, for one-half of the award goes to the minor child (Sec. 4703, Labor Code, St.1937, p. 285), and the death allowance under the charter is solely to the wife."

Even assuming that what has been heretofore said to be true, the case does not necessarily turn upon the disputed provisions in question. In any event the right of the city to make deductions from Mrs. Lyon's pension is controlled by well established general principles of law wholly separate and apart from any procedural approach.

Respondent, in support of the decision of the trial court argues that the extent of the deduction which could be made under section 173(j) is limited only by the amount of the compensation award "irrespective to whom the compensation is paid." It is further argued that by the phrase "benefits payable to or on account of such person under Workmen's Compensation Insurance," no distinction is made concerning the recipient thereof, and hence whether it be an award to the employee or to some third person the whole thereof may be deducted by the city.

[4] Paraphrasing the language used by the court in McKeag v. Board of Pension Commissioners, 21 Cal.2d 386, 390, 132 P. 2d 198, the language of section 173(j) should not be interpreted narrowly, "Rather, a liberal construction is to be given, in accordance with the rule ordinarily used in construing pension legislation," and we might add such a construction as will preserve, if possible, the constitutionality of the statute.

In light of the above rules it would appear that the argument of respondent cannot be upheld. The construction for which it argues is not consistent with the stated purposes of the act, is repugnant to the rule of liberal construction and would certainly raise questions as to the constitutionality of the act.

[5] As previously noted the "express intention" of the charter provision was that compensation payments should be a deductible credit against pension allowance thereby prohibiting "double payments * * at the expense of the taxpayers." The pension payable to Mrs. Lyons by virtue of section 173(d) of the Charter was payable solely to her. Her children were entitled to none of the amount so payable. She received only one-fourth of the death benefits payable by virtue of the Industrial Accident Commission award. The children received the remaining three-fourths. The compensation award was something wholly separate and apart from the pension, and hence the portion of the award payable to the children could in no sense be considered as a double payment to the plaintiff. Such a conclusion is entirely in accord with the stated policy of the pension act.

Also it must be admitted that the pension plan of the city, among other things, provided for the widow of city employees as a general class. Respondent, however, would so construe the statute as to destroy its uniformity of operation within the class by distinguishing between the members thereof. Such a construction would negative its constitutionality. We find no basis for such an interpretation.

> "A statute is not general or uniform, and it makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the

> persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other." (5 Cal.Jur. p. 825.)

[6] While it cannot be doubted that the pension plan of the city could be modified, that is not to say that under the guise of modification all of one's rights thereunder could be abrogated.

> "The right of the widow of a public employee to a pension benefit 'became vested while the statute under which she claims was in full force, and it was not competent for the legislature, or any other authority, to deprive her of that vested right.'" Kern v. City of Long Beach, 29 Cal.2d 848, 849, 179 P.2d 799, 801.

For the foregoing reason the judgment is reversed and the cause is remanded to the trial court with instructions to enter judgment in accordance with the views herein expressed.

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114 Cal.App.2d 503

EVANS v. RANCHO ROYALE HOTEL CO. et al.

Civ. 4428.

District Court of Appeal, Fourth District, California.

Dec. 2, 1952.

Rehearing Denied Dec. 19, 1952.

Hearing Denied Jan. 22, 1953.

Action for damages suffered by purchaser as a result of fraudulent representations allegedly made by vendors in connection with sale of realty. The Superior Court of Riverside County, O. K. Morton, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Mussell, J., held that written agreement cancelling contract for sale of realty constituted a final settlement precluding recovery of damages by purchaser for allegedly fraudulent representation in connection with the sale.

Judgment reversed.

1. Compromise and Settlement 🔑16(1)

Cancellation by mutual agreement of contract for sale of realty constituted a final settlement which precluded recovery of damages by purchaser for alleged fraud in inducing her to enter into contract and expend money in reliance thereon by false representation that multiple dwellings could be erected on the realty, since action for such alleged fraud arose out of and was based upon breach of contract of sale which had been rescinded.

2. Fraud 🔑31

A party to a contract allegedly defrauded by false representation may elect either to rescind the contract or to affirm it and sue for damages, but he cannot pursue both remedies.

3. Vendor and Purchaser 🔑86

A contract for sale of realty can be mutually abandoned by the parties at any stage of their performance and each of the parties released from any further obligation on account thereof by parol, and the fact of such abandonment may be established by evidence of the acts and declarations of the parties.

4. Evidence 🔑397(2)

Written agreement cancelling contract for sale of realty presumably contained all terms upon which the parties had agreed for rescission and could not be varied by parol.

5. Compromise and Settlement 🔑15(1)

Written agreement for cancellation of contract for sale of realty by mutual consent without discussion of question of damages raised an inference that all claims for damages were mutually waived and that cancellation agreement constituted a complete settlement of controversy.

◆

Thompson & Colgate, Riverside, for appellants.

Sarau, Adams, Neblett & Sarau, Riverside, for respondent.

MUSSELL, Justice.

This is an action to recover damages alleged to have been suffered by plaintiff in relying upon fraudulent representations made to her by defendants in connection with the sale of real property in Palm Springs. The representations were that one of the lots involved (lot 38) could be improved with multiple dwellings and used and occupied for income purposes, when the same was, in fact, restricted to single family dwellings by deed restrictions imposed upon it by defendants. The damages claimed by plaintiff consisted of the sum of $2,500 expended by her in obtaining the preparation of plans and specifications for seven multiple dwellings to be erected upon the property; $140 paid as a deposit on kitchen units to be installed on the premises; and $240 paid for rental of living quarters.

The trial court rendered judgment awarding plaintiff the damages claimed, with interest.

The sufficiency of the evidence to sustain the court's findings as to the representations made and damages suffered is not here questioned. The grounds relied upon by defendants for reversal of the judgment are that the parties mutually rescinded the contract of sale and that plaintiff was not thereafter in a position to recover damages by reason of the representations made by defendants.

On or about May 26, 1948, plaintiff and her husband advised a real estate agent in Palm Springs that they were interested in purchasing land that would be improved with apartment income property. The lots involved were shown to plaintiff and she was advised by the agent that lot 38 was available for improvement with multiple dwelling units. Plaintiff and her husband then had a conference with defendant Robert Levin regarding the possibility of improving lot 38 with multiple dwelling units and Levin was advised that plaintiff so intended to improve the property. Plaintiff was not then informed that deed restrictions had been placed on the property by defendant owners in 1946, which restrictions, among other things, classified lot 38 as R-1 property upon which only a single family dwelling could be erected.

Two days after this conference plaintiff made an offer for lot 38 and lot 37 adjoining, which was accepted by defendants, and on June 1st the defendant corporation executed a written contract with plaintiff for the sale of the two lots for the sum of $13,750 and plaintiff paid the agent $1,375 on the purchase price. On the following day an escrow was opened and plaintiff deposited in escrow the balance of the purchase price and her share of the expenses, totaling $12,420.

On June 2nd plaintiff engaged a designer to prepare plans and specifications to be used by plaintiff in the construction of plaintiff's proposed improvements on the property. Plaintiff also entered into an agreement with a corporation for the purchase of seven kitchen units and rented an apartment in which to live during the construction.

On June 11th the bank, as escrow holder, received a preliminary title report on lots 37 and 38 wherein reference was made to the deed restrictions on lot 38 and plaintiff then learned for the first time of the restrictions. A conference was then had with defendant Samuel Levin in which Levin stated to plaintiff that Robert Levin had been delegated to secure the signatures necessary to have the restrictions removed but that his work had not been completed. About thirty days later plaintiff's husband again contacted Samuel Levin in regard to the removal of the restrictions. At this meeting Levin was informed by plaintiff's husband that because defendants had not been able to remove the restrictions, plaintiff could not proceed with the transaction in time to complete the improvements for the 1948-1949 season and that if he could not be given a definite time, he did not see how plaintiff could proceed. Levin stated that if plaintiff could not wait until the signatures were secured, the only alternative was to cancel the transaction. An appointment was then made to meet at the bank the following morning to cancel the escrow, at which time cancellation instructions were prepared and signed by Samuel Levin who then gave plaintiff's husband a check for $1,375. The check and the instructions were taken to plaintiff, who signed the instructions and endorsed the check. The cancellation instructions were then returned to the bank where plaintiff's husband received a cashier's check for $12,420, theretofore paid in escrow by plaintiff.

There was no discussion by the parties as to the items of damage claimed in this action until the cancellation agreement was executed and plaintiff's money was returned to her.

The cancellation instructions were as follows:

> "Trust Department
> Bank of America
> National Trust and Savings Association
> Escrow No. 950–5838
> Amendment to
> Escrow Instructions
>
> "The previous instructions in this escrow No. 950–5838 are hereby modified and/or amended in the following particulars only:
>
> "You are directed to cancel your above numbered escrow and return all money and/or instruments to persons depositing same.
>
> "Rancho Royale Hotel Company hands you herewith check No. 1167 payable to Peggy G. Evans in the amount of $1375.00, representing money paid outside of escrow. As an accommodation only, you are directed to deliver said check to Peggy G. Evans.
>
> "Rancho Royale further agrees to pay all charges in connection with the cancellation, including title company charge and escrow cancellation fee. You are authorized to charge the commercial account of Rancho Royale Hotel Company for said charges.
>
> "Peggy Gene Evans hereby acknowledges receipt of Cashier's Check No. 9509822 in the amount of $12,420.00, together with check of Rancho Royale Hotel Company in the amount of $1375.00.
>
> ....
>
> "Rancho Royale Hotel Company,
> By s/ Samuel H. Levin—Pres.
> s/ Peggy Gene Evans."

[1, 2] Defendants' point "that the parties mutually rescinded the contract and having done so, the matter ended" is well taken. In Hjorth v. Bernstein, 44 Cal.App.2d 561, 564, 112 P.2d 643, this court held that a person claiming to be defrauded by false representation has a choice of two inconsistent remedies to wit, he may elect to rescind the contract; or, to affirm it and claim damages. He cannot do both. The right to damages exists unless and until the transaction is effectually disaffirmed. This holding was approved in Le Clercq v. Michael, 88 Cal.App.2d 700, 703, 199 P.2d 343.

In Karapetian v. Carolan, 83 Cal.App.2d 344, 347, 188 P.2d 809, 811, 1 A.L.R.2d 1075, it is said:

> "There can be no doubt that the remedies of rescission and an action for damages are inconsistent and that a completed or effectual rescission terminates the contract and bars an action for fraud. McCready v. Bullis, 59 Cal.App. 286, 210 P. 638; Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 67 P.2d 1039. The correct rule supported by authorities, is stated as follows in 6 Cal.Jur. p. 388, § 233: 'Upon the breach of a contract a party thereto may treat it as rescinded, and if he has advanced money on it, bring an action for its recovery; or he may treat the contract as still in force and maintain an action for damages for the breach, but he cannot pursue both courses. If the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by breach of the covenants.' "

[3] In Martin v. Butter, 93 Cal.App.2d 562, 566, 209 P.2d 636, 638, it is stated, quoting from Tompkins v. Davidow, 27 Cal.App. 327, 335, 149 P. 788:

> " ' "There can be no question that a contract can be mutually abandoned by the parties at any stage of their per-

formance and each of the parties released from any further obligation on account thereof; that it may be done by parol, and the fact of its having been done established by evidence of the acts and declaration of the parties."'" (Citing cases.)

The plaintiff argues that she is not seeking damages for breach of contract nor is she seeking to recover any payment to appellants pursuant to a contract, but that she merely seeks restoration to her original position by reason of the present tort action wherein she seeks damages in the amount expended by her in reliance upon the fraudulent representations made by the defendants; that the action is not upon the contract but is a collateral tort action. We cannot agree with this contention.

Plaintiff's action for fraud arises out of and is based upon the breach of the contract of sale by the defendants and since the contract was canceled by mutual agreement, plaintiff was thereafter precluded from recovering damages for its breach. The cancellation constituted a final settlement, leaving no room for further claims.

[4, 5] It is argued that there was no meeting of the minds or agreement to waive damages claimed herein at the time the cancellation agreement was executed. The record shows that this matter was not discussed by the parties and it is to be presumed that the written agreement contained all the terms upon which the parties had agreed for rescission and that the contract could not be varied by parol. The inference is that there was a mutual waiver of all claims for damages and that it was a complete settlement of their controversy. In this connection it may be noted that the plaintiff, in addition to accepting the moneys paid by her on the purchase price of the property, also received part of the expenses in connection with the transaction. As was said in Winton v. Spring, 18 Cal. 451, 454, 455:

> "The agreement of cancellation evidently was intended to effect a complete settlement in regard to the subject; it discharges the parties from all covenants and agreements in the original contract, and provides for a surrender of the premises. * * * It is much more probable that when parties come to an arrangement of a business matter, they settle all the terms of the contract, than that they leave them unadjusted. The word 'cancel,' applied to the agreement, under the circumstances, means no more than 'doing away with' an existing agreement upon the terms and with the consequences mentioned in the writing. What is not said, is excluded; and whatever was meant to be obligatory was expressed."

In Gardner v. Shreve, 89 Cal.App.2d 804, 808, 202 P.2d 322, 324, it is said:

> "Normally any agreement to rescind or modify an existing bilateral relation finds sufficient consideration in the prior rights of the parties which are surrendered. Restatement of Contracts, sec. 406, Comment a; VI Williston on Contracts, Revised Edition, sec. 1826; Sistrom v. Anderson, 51 Cal.App.2d 213, 219, 124 P.2d 372."

The record herein shows that the parties cancelled the agreement for sale and purchase of the real estate involved upon terms acceptable to both of them. This cancellation was consummated and the contract in that regard was fully carried out. Plaintiff was thereafter precluded from recovery of damages such as are herein sought.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; EDMONDS, CARTER, and TRAYNOR, JJ., dissenting.

114 Cal.App.2d 364

ERWIN v. CEE-TEE CONST. CO. et al.

Civ. 4440.

District Court of Appeal, Fourth District,
California.

Nov. 25, 1952.

Action for breach of contract and for money claimed to be due upon an account stated. The Superior Court, San Bernardino County, John A. Hewicker, Judge assigned, denied defendants' motion to change venue, and defendants appealed. The District Court of Appeal, Griffin, J., held that where complaint alleged that contract was entered into and was to be performed in Los Angeles County, defendants who were residents of Los Angeles County and whose affidavits positively stated that contract was entered into, in toto, in Los Angeles County were entitled to change of venue from San Bernardino County, notwithstanding allegations in complaint that supplemental contract was executed in part in San Bernardino County and that some other verbal agreements obliged defendants to perform in San Bernardino County.

Order denying motion for change of venue reversed.

1. Venue 🔑21

Defendant is generally entitled to have an action tried in the county of his residence, and to have an action tried elsewhere he must bring himself within the provisions of some express statute.

2. Venue 🔑7

Actions on contract, except as provided by statute, are personal actions triable in the county of defendant's residence. Code Civ.Proc. § 395.

3. Venue 🔑70

Where complaint alleged that contract was entered into and was to be performed in Los Angeles County, defendants who were residents of Los Angeles County and whose affidavits positively stated that contract was entered into in toto, in Los Angeles County, were entitled to change of venue from San Bernardino County, notwithstanding allegations in complaint that supplemental contract was executed in part in San Bernardino County and that some other verbal agreements obliged defendants to perform in San Bernardino County. Code Civ.Proc. § 395.

4. Corporations 🔑503(4)

Constitutional provision authorizing action against corporation in county where contract is made or to be performed, where obligation or liability arises or breach occurs, or where corporation's principal place of business is situated is waived by joinder of individual defendants who reside in another county and who have right to have action tried in county of their residence. Code Civ.Proc. § 395; Const. art. 12, § 16.

5. Pleading 🔑45

In action upon an account stated, allegation in complaint that account was stated in county in which plaintiff seeks to maintain action is essential to defeat defendant's motion for change of venue to county of his residence.

6. Venue 🔑16½

A change of venue to which defendant is entitled on one contractual cause of action must be granted regardless of how many other causes of action are set forth in which defendant is not entitled to a change.

◆

Albert G. Bergman, Los Angeles, for appellants.

Martin C. Casey and John W. Kerrigan, San Bernardino, for respondent.

GRIFFIN, Justice.

At the time of the filing of the complaint in this action for damages for breach of a contract and for "damage to his credit rating and business reputation", claimed due under the first count, and for money claimed to be due under the second count, upon an account stated, plaintiff's residence and principal place of business was in the county of San Bernardino. The individual defendants lived in Los Angeles County and had their principal place of business in that county. Plaintiff, together with defendant corporations Cee-Tee Construction Company, Consumers Transportation Corporation, Consumers Holding

Company, alleged to be the alter ego of the individual defendants, and the individuals D. M. Patritti and M. Patritti, formed a joint venture among themselves in which it was designated that the principal place of their business under the joint venture would be at Puente, Los Angeles County. The purpose of the joint venture was to complete a certain state highway construction project in Imperial County. The details of this joint venture are set forth in a certain written contract marked as Exhibit A, attached to the complaint. All defendants were served with process in Los Angeles County.

On January 10, 1948, due to disagreements, the parties executed another written contract (Exhibit C) whereby defendants took over the completion of the original contract (Exhibit A). Defendants thereby agreed to refund plaintiff certain cash advanced by him, to repay invoices paid by plaintiff, and among other things agreed to pay certain profits due under the original contract up to April, 1948.

Defendants moved for a change of venue to Los Angeles County. They filed affidavits in support of the motion, as well as an affidavit of merits. In these affidavits they recite that each of the defendant corporations who were served with process in Los Angeles County were at all times prior to the commencement of the action and ever since have been and now are residing and conducting business in that county. They specifically relate that they deny each and every allegation of the complaint set forth in both counts, and affirmatively allege that at all times referred to in plaintiff's complaint "each, all and every transaction had, made or entered into or consummated with plaintiff by said corporations" and the defendants "individually, and all agreements and/or oral contracts made between" defendants "individually and said corporations were, actually, and in fact entered into, consummated and/or concluded at and while said parties were in the County of Los Angeles. * * * That at the time of the making of any and/or all agreements and/or oral contracts between the parties hereto, said parties further agreed that the same were to be performed and that any obligation, express or implied, arising therefrom, and *all sums* or amounts, if any, to become due or payable thereunder to plaintiff, were to be paid to him at the place of business of said defendant corporations * *" in the County of Los Angeles.

[1, 2] It is quite apparent under the showing made by the defendants that the cause should have been transferred to the County of Los Angeles. A defendant is generally entitled to have an action tried in the county of his residence, and if the plaintiff would have an action tried elsewhere he must bring himself within the provisions of some express statute. Actions on contract, except as provided by Code of Civil Procedure section 395, are personal actions triable in the county of defendant's residence. Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104. The exceptions provided by section 395 are that: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

Plaintiff filed no counter-affidavits in opposition to the affidavits presented by defendants, but relies solely upon the general allegations of the complaint to bring him within these exceptions. We will therefore examine the complaint to determine whether he has brought himself within these exceptions. There is no allegation in the complaint that the contract (Exhibit A) was *in fact* entered into in San Bernardino County, or that the obligation was incurred therein. The contract itself is silent as to the place where it was executed and as to where the obligation was incurred. It does recite that the principal place of business of the joint venture was to be at Puente, Los Angeles County, California, that the work to be performed was in Imperial County, and that each of the joint venturers would share equally in the net profits, distribution to be made upon completion of the final audit.

The complaint then recites that the parties entered into the joint venture; that a disagreement arose and that on January 10, 1948, they entered into the written contract (Exhibit C); that defendants agreed to pay plaintiff the sums set forth in certain paragraphs of that contract and to release plaintiff from liability under the joint venture agreement; that under contract (Exhibit A) plaintiff was obligated to deposit certain money with a bonding company as collateral; that funds received from the State of California as periodic payments by reason of the "State Job" were continued to be deposited in trust in Puente in the joint venture account, and paid out solely by plaintiff and one of the defendants; that at the time the parties executed the contract (Exhibit C) it was further orally agreed that notwithstanding the termination of the joint venture agreement, plaintiff would continue to furnish rental material and equipment thereafter and that defendants would pay plaintiff the same customary rate upon plaintiff's submitting invoices therefor, as mentioned in paragraph 2 of the contract (Exhibit C). It was then alleged that plaintiff performed his part of the agreement and defendants failed to perform theirs in certain particulars, i. e., that defendants failed to pay for certain rental of the material and equipment, and refused and failed to deposit funds received from the State to pay the obligations of the joint venture, and plaintiff was obliged to forfeit the cash collaterally deposited with the bonding company, which amount the defendants had agreed to assume and pay under said agreement; that plaintiff was obligated to defend numerous lawsuits and incurred attorneys' fees and expenses, to plaintiff's damage in the sum of $75,000; that defendants failed to pay the interest on the Riverside bank loan and plaintiff was accordingly damaged in the sum of $4,812.50; that they failed and refused to pay plaintiff $7,500 as agreed in contract (Exhibit C), and then he adds the additional claim that by reason of the facts set forth plaintiff suffered serious injury and damage to his *credit rating and business reputation*, to the extent of $100,000. The general prayer, after deducting certain credits, was for $182,334.78.

As a second and separate cause of action, plaintiff alleges, without stating the place, that on the 20th day of April, 1950, "a written account was stated by and between the plaintiff and the defendants by which there was ascertained to be due and owing to the plaintiff from the defendants a balance of $37,670.36, payable to the plaintiff at his place of business in the County of San Bernardino"; and that no part thereof had been paid. Judgment was sought on the first cause of action in the amount indicated and on the second cause of action in the amount suggested therein. It is upon these allegations that plaintiff claims he has brought himself within the exceptions and he rests solely upon them.

[3, 4] As to the execution of the original contract (Exhibit A), it is apparent from the showing made that the obligations therein set forth were to be performed in Imperial County and in Los Angeles County; that the contract was entered into in Los Angeles County, and that the obligation was incurred therein, and at the time the defendants were residents of that county and the corporations were doing business therein. The only possible statement in plaintiff's complaint which would indicate otherwise in reference to the contract (Exhibit C) is that "said contract 'C' entered into between the parties was further executed *in part* in said County of San Bernardino", (Italics ours) and that "the aforesaid obligations of the defendants as set forth in the aforesaid contract 'C' and particularly, the payments due and owing to the plaintiff by reason thereof were all to be performed in the county of San Bernardino * * * and all such payments were to be paid to the plaintiff at his place of business located in said San Bernardino County, and it was so verbally agreed at the time said contract was executed * * *." The allegation that contract (Exhibit C) was executed "in part" in the county of San Bernardino is not a sufficient allegation to bring plaintiff within the exception provided by section 395 of the Code of Civil Procedure, which recites that it may be in the county "in which the contract in fact was entered into". The allegation is but a mere conclusion and is in effect an admission that a part of the contract was not executed in that county. The affidavits of the defendants positively state that it was executed in Los Angeles County in toto and accordingly, without any more showing on the part of the plaintiff, the court should have accepted defendants' statement in this respect as true. California Bean Growers' Ass'n v. C. H. & O. B. Fuller Co., 78 Cal.App. 522, 248 P. 967; Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 262 P. 452; Hagan v. Gilbert, 83 Cal.App.2d 570, 189 P.2d 548; Wilson v. Hoffman, 81 Cal.App.2d 664, 184 P.2d 951; Tringali v. Vest, 106 Cal.App.2d 720, 236 P.2d 171; Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594; Claycomb v. Caronna, 113 Cal.App.2d 561, 248 P.2d 779.

It therefore affirmatively appears that the obligation was incurred in the county of Los Angeles, and under section 395 of the Code of Civil Procedure such county shall be deemed to be the county in which it was to be performed, unless there is a *special contract in writing to the contrary.* Plaintiff does not allege any such special contract but relies upon the bare allegation that according to some *verbal agreement* the obligations of defendants, as set forth in contract (Exhibit C), and particularly the payments due and owing, were to be performed in San Bernardino County and were to be paid to plaintiff at that place. Under the section this is not a sufficient showing that the obligations were to be performed in that county. It would be difficult to hold that the defendants verbally agreed to make the payments to plaintiff in San Bernardino County for the amounts set forth in contract (Exhibit C), and include therein $100,000 damages sought for injury to credit rating and business reputation. We conclude, as to the individuals at least, that by the pleadings in plaintiff's complaint, in view of the affidavits filed by the defendants, he did not bring himself within the exceptions provided for nor, as against the corporations, was the county of San Bernardino the proper place of trial under Article XII, sec. 16 of the Constitution. The individual defendants having established the right to trial in the county of their residence, the action must accordingly be transferred to that county. By including in an action other defendants, whose residences are outside of the county in which the action is brought, the plaintiff waives the right given by the Constitution and the motion of the defendants for the change of the place of trial must be determined by the provisions of the statute. Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209; Liera v. Los Angeles Finance Co., 99 Cal.App.2d 254, 221 P.2d 737.

[5, 6] As to the second cause of action, plaintiff does not allege that an account was stated in San Bernardino County, by and between the plaintiff and the defendants. Under the holding in Tringali v. Vest, supra, such an allegation is essential unless plaintiff brought himself within the exception stated. See, also, Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594. It becomes unnecessary to determine whether the second count, as pleaded, was a local or transition action, in view of the conclusions we have reached as to the first count, since it is well established that if a defendant is entitled to a change of venue on one contractual cause of action, such change must be granted regardless of how many other causes of action are set forth in which the defendant is not entitled to a change. Tringali v. Vest, supra; Gilman v. Nordin, 112 Cal.App.2d 788, 247 P.2d 394; Hagan v. Gilbert, 83 Cal.App.2d 570, 189 P.2d 548; Crofts & Anderson v. Johnson, supra.

The order denying the motion for change of venue is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

114 Cal.App.2d 391

CASEY v. KATZ.

Civ. 15130.

District Court of Appeal. First District, Division 2, California.

Nov. 26, 1952.

Action against administrator of decedent's estate, based on allegedly malicious prosecution of plaintiff, on complaint of decedent, for battery. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., sustained defendant's demurrer without leave to amend, and from the judgment for defendant which followed, plaintiff appealed. The District Court of Appeal, Dooling, J., held that the action was barred by plaintiff's failure to present claim for such injury against decedent's estate within the statutory period.

Judgment affirmed.

1. Executors and Administrators ⚿224

Action based on malicious prosecution for battery was one for "injury to property" within statute requiring presentation of claims for damages for injury to property against estates of decedents. Probate Code, § 707.

See publication Words and Phrases, for other judicial constructions and definitions of "Injury to Property".

2. Executors and Administrators ⚿223

Statute requiring presentation of claims for damages for physical injuries or death or injury to property against estates of decedents is not to be given retroactive effect so as to apply to actions which had been commenced before it became operative, but since it affects procedure only, and not substantive rights, it is applicable to all actions against representatives of decedent's estates commenced after its effective date. Probate Code, § 707.

3. Constitutional Law ⚿106

No litigant has any vested rights in mere matters of procedure, so long as an adequate remedy remains.

4. Constitutional Law ⚿106

Conditions precedent to the maintenance of causes of action that have already accrued may be imposed by the Legislature, where the requirements operate only as reasonable restrictions on the exercise of the right to sue.

5. Executors and Administrators ⚿224

Action against administrator of decedent's estate, based on an allegedly malicious prosecution of plaintiff for battery instituted on decedent's complaint, was barred by plaintiff's failure to present claim for the alleged injury against decedent's estate within the statutory period. Probate Code, § 707.

◆

Lionel Browne, Harold A. Harwood, San Francisco, for appellant.

Henry F. Boyen, Frank J. Fontes, Douglas M. Moore, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff brought an action for malicious prosecution against defendant as administrator of the estate of Harry Lasky, deceased. A demurrer to the amended complaint was sustained without leave to amend and from the judgment which followed this appeal was taken.

The amended complaint alleges that Lasky died on September 21, 1949 and that defendant was appointed administrator of his estate on October 19, 1949. It contains no allegation that a claim was filed or presented.

Prior to October 1, 1949 section 707 of the Probate Code did not require the presentation of claims grounded in tort against the estates of decedents. National Auto. & Cas. Ins. Co. v. Ainge, 34 Cal.2d 806, 215 P.2d 13. In 1949 however the legislature amended sec. 707, Prob.Code to require the presentation of claims "for damages for physical injuries or death or *injury to property*." (Emphasis ours.)

[1] This action is based on the prosecution for battery of plaintiff on the complaint of the decedent in May, 1949, and the cause of action which survived decedent's death on September 21, 1949 is one for "injury to property." Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 918,

171 A.L.R. 1379; Moffat v. Smith, 33 Cal. 2d 905, 206 P.2d 353. Since Prob.Code sec. 707 as amended requires the presentation of a claim for "injury to property" the cause of action in this case falls squarely within its terms. The date on which the original complaint was filed does not appear in the transcript but since the appointment of defendant as administrator is alleged to have occurred on October 19, 1949 the original complaint must have been filed after the effective date of the amendment to Prob.Code sec. 707 which was October 1, 1949.

[2–5] The 1949 amendment to Prob. Code sec. 707 is not to be given retroactive effect so as to apply to actions which had been commenced before it became operative, National Auto. & Cas. Ins. Co. v. Ainge, supra, 34 Cal.2d at page 810, 215 P.2d 13, but since it affects procedure only and not substantive rights it is properly applicable to all actions against representatives of decedent's estates commenced after its effective date. No litigant has any vested rights in mere matters of procedure, San Bernardino County v. Industrial Acc. Comm., 217 Cal. 618, 628 et seq., 20 P.2d 673; Arques v. National Superior Co., 67 Cal.App.2d 763, 778, 155 P.2d 643; City of Los Angeles v. Oliver, 102 Cal.App. 299, 315–316, 283 P. 298, so long as an adequate remedy remains. Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648; Lantz v. Fishburn, 17 Cal.App. 583, 590, 120 P. 1068. This rule finds frequent application where existing statutes of limitations are shortened or new ones adopted (5 Cal.Jur., Constitutional Law, § 148, pp. 755–756) and "(c)onditions precedent to the maintenance of causes of action that have already accrued may be imposed by the legislature, where the requirements operate only as reasonable restrictions on the exercise of the right to sue". 16 C.J.S., Constitutional Law, § 258, p. 680; Hewitt Logging Co. v. Northern Pac. Ry. Co., 97 Wash. 597, 166 P. 1153, 3 A.L.R. 198; Lamburth v. Winchester Ave. R. Co., C.C., 76 F. 348. In this case appellant had the full time allowed by Prob.Code sec. 707 within which to present the required claim so that it is not open to him to argue that the time actually available was unreasonably short.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

114 Cal.App.2d 291

TOWNSEND et al. v. ALLEN et al.

Civ. 14928.

District Court of Appeal, First District,
Division 2, California.

Nov. 20, 1952.

Hearing Denied Jan. 15, 1953.

Action to quiet title to real property, and to declare void certain restrictions and right of re-entry which defendants claimed to be entitled to enforce. The Superior Court, Marin County, Jordan L. Martinelli, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that restrictions, which were intended for benefit of lands retained by grantor, were waived and avoidable, where all lands retained by grantor were subsequently conveyed without restrictions.

Judgment affirmed.

1. Deeds 🔑170

Where deed stated that restrictions on use of property contained therein were express conditions, and gave a right of reentry in case of violation without any indication that possible forfeiture was not intended by parties, and where such restrictions were not unlawful or unreasonable, restrictions were, when made, valid and enforceable as written.

2. Deeds 🔑175

Notwithstanding fact that they are in form of conditions subsequent, restrictions in deed may be avoided in equity when changed circumstances or prior conduct of party seeking enforcement has caused enforcement to be purposeless or inequitable.

3. Deeds ⚷173

Restrictions on use of property conveyed, which have as their basis the benefit to be conferred on other property in same tract, may not be enforced by any one other than the owner of part of the land for the benefit of which restriction was imposed.

4. Quieting Title ⚷44(3)

In action to quiet title against restrictions on use of property, evidence sustained finding that restrictions were made for the benefit of the lands retained by grantor.

5. Deeds ⚷170

Extrinsic evidence is admissible to prove the purpose of restrictions on use of property contained in deed.

6. Deeds ⚷175

Where party claiming right to enforce restrictions on use of property contained in deed has acted in such a manner or has caused such changes that enforcement of restrictions would no longer be equitable, party will be held to have waived restrictions.

7. Pleading ⚷406(9)

In action to quiet title against restrictions on use of property contained in deed, defendant could not complain that waiver of restrictions was not sufficiently pleaded where evidence of acts showing such waiver was received without objection and court accordingly made a finding on such evidence.

8. Deeds ⚷175

Restrictions on use of property contained in deed, which were intended for benefit of lands retained by grantor, were waived and avoidable, where all lands retained by grantor were later conveyed without restrictions.

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Everett S. Layman, San Francisco, Kenneth S. Carey, San Francisco, of counsel, for appellants.

Myers & Carter, San Anselmo, for respondents.

NOURSE, Presiding Justice.

Defendant Alysse Wyatt Allen appeals from a judgment quieting title to certain real property in plaintiffs and declaring void certain restrictions and right of reentry which defendant claimed she was entitled to enforce.

The basic facts are undisputed. The property involved was deeded on January 6, 1908 by Mrs. Alice Latham and her husband to William L. Deysher. In the deed the property—we shall further use the terms Deysher deed and Deysher property—was described in substance as lot (1) on a plat of land of Mrs. Alice Latham in San Anselmo, County of Marin, State of California, which subdivision map had been recorded on January 4, 1908, after having been duly acted on. No restrictions applicable to the lots of the subdivision were recorded. The Deysher deed stated as express conditions of the conveyance in substance that the lot should not be used for sale, etcetera of liquor, that the public and private roads fronting the lot should be kept clear of vehicles, farm implements and other obstructions and that in case of violation of these conditions title would revert to the grantors and they would have the right to re-enter. At the time of the Deysher deed Mrs. Latham owned as her separate property a tract of land in San Anselmo of which the recorded subdivision formed part and she and her husband owned as community property a tract of land abutting on Mrs. Latham's separate tract, on which community tract, further called the home tract, the Lathams lived. Mrs. Latham never sold any lot of the plotted subdivision except the Deysher lot. For many years Deysher operated a garage on said lot and Mrs. Latham continued to live on the home property. On April 24, 1926, Mrs. Latham deeded the home tract to her granddaughter Alysse Wyatt Allen, appellant herein, and her other tract including the platted subdivision with the exception of the Deysher lot to her daughter Mrs. Alysse Latham Allen without making any restrictions as contained in the Deysher deed in either of these two deeds. Both the latter deeds were recorded in September, 1939, after Mrs. Latham had died in that month. Mrs. Alysse Latham Allen and Alysse Wyatt Allen were Mrs Latham's only heirs and devisees. Moreover, Alysse Wyatt Allen was executrix of her will. On September 30, 1944, the two grantees each conveyed the land obtained to Lang Bros., a partnership, again without making any restrictions as imposed on the Deysher property. The successor of the grantee partnership, the Lang Construction Company, at the time of the trial in this case was preparing the lands acquired for commercial and multiple dwelling purposes, not in accordance with the recorded plat of Mrs. Latham. Some of the roads projected on the plat had been abandoned. In 1947 the plaintiffs acquired the Deysher property, with knowledge of the restrictions contained in the Deysher deed, which had been recorded. In September, 1948, they instituted this action to quiet title and avoid the restrictions contained in the said deed. Only Alysse Wyatt Allen, both in her individual capacity and as executrix of the will of Mrs. Latham, the original grantor, answered claiming to have succeeded to the rights reserved by the grantor in the Deysher deed. Alysse Latham Allen and the Lang partners filed disclaimers.

After having taken evidence, among other things with respect to the increasing commercial and industrial development of the neighborhood, the court found in substance the facts to be as stated above and further in part that the restrictions had been incorporated in the Deysher deed for the protection of the other lots of the subdivision as first class residential property and for the protection of the land retained by Mrs. Latham for her own use; that when Mrs. Latham disposed of all said land without placing any restriction on it, she waived said restrictions; that appellant and Mrs. Alysse Latham Allen before the institution of this action had disposed of all lands involved without making any restrictions and that they did not live in, or own any property or have any interest in San Anselmo or its environs, and that because of change in the purpose for which surrounding lands were used all property involved was best used for business purposes, wherefore the court concluded in accord with plaintiffs' prayers.

Appellant urges mainly that the right of re-entry reserved in the Deysher deed was an interest in real property which cannot be avoided in equity in the same manner as this can be done with respect to equitable servitudes; that where the deed did not provide that the restrictions were made for the benefit of the remainder of the tract as dominant tenement, the interest reserved was personal to the grantor and her successors in interest and was not lost by her disposing of the remainder of the tract or by waiver; that the court could not base a finding that the restrictions were made for the benefit of lands retained by the grantor on evidence outside the deed and that the change found in the purpose for which surrounding lands were being used had no relation to the subject matter of the restrictions reserved.

[1, 2] It may be conceded that where the Deysher deed stated the restrictions involved to be express conditions and gave a right of re-entry in case of violation without any indication that possible forfeiture was not intended by the parties, and where said restrictions were not unlawful or unreasonable, said conditions were, when made, valid and enforceable as written. Rosecrans v. Pacific Electric Ry. Co., 21 Cal.2d 602, 605, 134 P.2d 245; Wedum-Aldahl Co. v. Miller, 18 Cal.App.2d 745, 750, 64 P.2d 762. However it does not follow from the character of said restrictions as conditions subsequent with right of re-entry that said restrictions must be secure from attack in equity when changed circumstances or prior conduct of the party seeking enforcement has caused said enforcement to be purposeless or inequitable. In California cases such circumstances have long since led to avoidance of restrictions notwithstanding the fact that they were in the form of conditions subsequent. In Brown v. Wrightman, 1907, 5 Cal.App. 391, 90 P. 467, an express condition subsequent against sale of intoxicating liquor or maintaining of a house of prostitution on the premises was held waived and grantor estopped from enforcing it where he sold portions of the tract of land retained by him without incorporating such conditions, and grantees of such portions maintained houses of prostitution and places for the sale of intoxicating liquor on their prem-

ises with the knowledge and acquiescence of the plaintiff. In Bernstein v. Minney, 1929, 96 Cal.App. 597, 274 P. 614, the owners of a tract being subdivided imposed building restrictions as conditions subsequent with reverter in case of breach on three lots they sold. The conditions among other things restricted the use to residential purposes. The grantors did not uniformly impose the restrictions when selling other lots and permitted use of lots for business purposes so that the character of residential property of the land around the restricted three lots was lost. A judgment quieting title to the three lots against the conditions subsequent was upheld on appeal on the basis of waiver, 96 Cal.App. at page 601, 274 P. at page 615. The court pointed out that if the restrictions had been breached the grantors would not have been entitled to damages and added, 96 Cal.App. at page 600, 274 P. at page 615: "Does the mere fact that a forfeiture of the whole fee is stipulated in the deeds alter the power of this court, under these circumstances, to render equitable justice? We think not. It is for just such conditions as these that equity is designed as a remedial agency." Also in Wedum-Aldahl Co. v. Miller, supra, 1937, 18 Cal.App.2d 745, 64 P.2d 762, title of the grantee to lots in a subdivision was quieted free from a right of reverter to the grantor in case of breach of restrictions—in that case, as in ours, restrictions against sale of intoxicating liquor. The grantor had given up his original purpose to hold the whole development free of intoxicating beverage, had sold many lots in the same tract without liquor restrictions and had acquiesced in violation of clauses inserted in other deeds. It was held that under these circumstances enforcement of the restrictive clause against the plaintiff would be inequitable, that it must be considered waived and the grantor estopped from asserting its validity. In Young v. Cramer, 1940, 38 Cal.App.2d 64, 100 P.2d 523, a successor of the grantor was denied enforcement of a right of re-entry reserved for grantor in case of breach of restrictions imposed on each lot as part of a general plan for improvement of the tract for the benefit of each parcel of the tract as dominant tenement, where the grantor no longer owned any land within the tract. In Alexander v. Title Ins. & Trust Co., 1941, 48 Cal.App.2d 488, 119 P.2d 992, a restriction limiting the use of a lot of a subdivided tract to single residences and a right of reverter in case of breach were removed when it was shown that the right of reverter as to the lots of that tract was held by defendant trust company who had relinquished the reversionary interest in some of the lots in consideration of substantial amounts of money but which did not own any land in the tract, and that because of changed conditions in the surroundings the property had become unfit for residential purposes and valuable for commercial use. It was held that the restrictions were obviously made for the benefit of the other property in the tract and that enforcement of the restrictive provisions against plaintiff was inequitable and could not be claimed by defendants who had no interest in the upholding and had shown this lack of interest by relinquishing the restrictions as to other lots. This court in Maderis v. Pattavina, 1941, 46 Cal.App.2d 615, 116 P.2d 495, held that subdividers who had conveyed certain lots on express conditions with reverter in case of breach, representing orally that all lots were being sold on these same conditions, waived their right to enforce them when they conveyed other lots without inserting the same.

In none of these cases did the circumstance that the right of re-entry or reverter might be considered a conditional interest in real property, as urged by appellant, prevent the destruction of that interest when the enforcement of the restriction it was intended to protect had become useless or inequitable. Correctly so. The technical classification of a legal concept alone may not prevent an equitable and useful solution. The effect of upholding restrictions with right of re-entry for breach after the practical purpose for which they were reserved has ceased is to hamper the usefulness of the property and to give the grantor or his successors in interest the power to exact compensation for their release, without any benefit to society. Alexander v. Title Ins. & Trust Co., supra, is a good example of such abuse and its termination by the court.

[3] Neither do we agree with the contention that because the Deysher deed did not contain any express statement that the restrictions were for the benefit of the other lands of the grantor and enforceable by any future lot owner it was without importance whether defendant had any interest in their enforcement, or whether she still owned any of said lands. It is true that in California under such circumstances grantees of other lots can in no manner take advantage of the restrictions and the right of enforcement (by re-entry) is limited to the grantor and his successors in interest. Werner v. Graham, 181 Cal. 174, 179, et seq., 183 P. 945; McBride v. Freeman, 191 Cal. 152, 154, 215 P. 678; Childs v. Newfield, 136 Cal.App. 217, 222, 28 P.2d 924. However it does not follow that the grantor retains said right of enforcement even though he has disposed of all land he had retained without making any such restriction. The contrary is shown by cases relating to building and occupation restrictions on subdivisions in which cases the right of enforcement of grantor is considered lost when he has lost all interest in the property to be benefited. In Firth v. Marovich, 160 Cal. 257, 260, 116 P. 729, 731, it is said (obiter): "It is not open to question that building restrictions of the kind contained in the deed * * * are valid and enforceable at the suit of the grantor, *so long as he continues to own any part of the tract for the benefit of which the restrictions were exacted.*" (Emphasis ours.) In Alexander v. Title Ins. & Trust Co., supra, 48 Cal.App.2d at page 492, 119 P.2d at page 994, the court states that such building restrictions *obviously* have as their basis the benefit to be conferred on other property in the same tract and cites Young v. Cramer, supra, 38 Cal.App.2d 64, 100 P. 2d 523, for the proposition that such restriction may not be enforced by any one other than the owner of part of the land for the benefit of which the restriction was imposed. See also Blodgett v. Trumbull, 83 Cal.App. 566, 571–572, 257 P. 199; Moe v. Gier, 116 Cal.App. 403, 408, 2 P.2d 852; Ann. 43 A.L.R. 1049, 1052 and cases from other jurisdictions cited in the Young case 38 Cal.App.2d at page 68, 100 P.2d at page 525, of which the two Texas cases, Maddox v. Adair, Tex.Civ.App., 66 S.W. 811, 813 and Stevens v. Galveston, H. & S. A. Ry. Co., Tex.Com.App., 212 S.W. 639, 645, are especially well in point.

[4] In this case it is not so obvious as in the building restriction cases that the restriction as to sale of liquor was imposed for the benefit of the lands retained by grantor because such restriction could also have been based on her opposition to the use of alcoholic beverage in general. However the trial court found that the restriction was made for the protection of the lands retained and that finding is adequately supported by the evidence that at the time the restriction was made grantor lived nearby and had planned to subdivide part of her property, that when grantor and later her grantees, among whom appellant, parted with all of the remaining property they did not impose any such restriction—an attitude which tends to negative objection to alcoholic beverage in general as the purpose of the restriction—and that at the same time as the restriction on the sale of liquor a restriction was imposed as to obstruction of roads, a restriction evidently intended only for the benefit of the neighbors. Because of this finding of fact we need not decide whether the restriction should not also have been considered abandoned or lost if it had originally been reserved because of personal opposition of grantor to the use of liquor in general.

[5] We also reject appellant's contention that the deed is the only memorial which can prove the purpose for which the restrictions contained in it were imposed. Appellant cites many cases among which Werner v. Graham, supra, 181 Cal. at page 185, 183 P. at page 949, and Wing v. Forest Lawn Cemetery Ass'n, 15 Cal.2d 472, 479, 101 P.2d 1099, 130 A.L.R. 120, for the above proposition. However all these cases, with the exception of one to be mentioned later, relate to the creation of mutual rights in real property in the character of equitable easements or covenants running with the land, enforceable by the different grantees of lots inter se and require

that such *creation* be stated in the written instruments exchanged to determine the rights in the realty, a requirement necessarily based on the statute of frauds or the parol evidence rule or both. The statute of frauds is evidently not applicable to the purpose for which restrictions made in writing were created, in connection with the problem whether such restrictions were still enforceable after such purpose may have ceased to exist. Neither did the admission of extrinsic evidence as to the purpose of the restrictions in this case violate the parol evidence rule as it was not admitted to vary any terms of the deed but to find the intention of the parties as to a point not directly involved in and left in doubt by said deed. See Boyer v. Murphy, 202 Cal. 23, 28–29, 259 P. 38; 9 Cal.Jur. 387. Compare Maderis v. Pattavina, supra, 46 Cal.App.2d at page 617, 116 P.2d at page 496, and Cornbleth v. Allen, 80 Cal.App. 459, 463, 251 P. 87, for the extent of the above rule from Werner v. Graham.

The only case cited by appellant which supports her contentions to some extent is Currie v. Title Ins. & Trust Co., 60 Cal. App. 192, 212 P. 409. There the court reversed a judgment quieting title to a lot as against certain building and occupation restrictions in the form of conditions subsequent with reverter to grantor in case of breach, although the grantor had disposed of all other lots in the same tract, on the ground that the restrictions inured to the grantor and not to the owner of certain lots of land citing as sole authority Werner v. Graham, supra. The decision has never been followed and we doubt whether it finds support in the Werner case. At any rate it can be distinguished on its facts from the case before us because in the Currie case the only ground adduced for avoidance of the restrictions was that the grantor had disposed of all the property benefited by the restrictions whereas in this case moreover no restrictions were imposed on any of the neighboring land of which the grantor disposed and the restrictions had therefore lost all legitimate interest not only for grantor and her successors but for the present owners of the neighboring lands as well. Under the latter circumstances the avoidance of the restrictions is certainly justified.

[6, 7] It is without importance whether said disposal of all lands retained without imposing any restrictions amounts to waiver in the technical sense of the word. In most of the cases cited herein as examples of the destruction of conditions subsequent waiver was found although there was no *intentional* relinquishment of the right of re-entry. In such cases the word "waiver" —sometimes combined with "estoppel"— does not mean more than that the party claiming a right to enforce has acted in such a manner or has caused such changes that enforcement would no longer be equitable. In that sense there was waiver here and the finding to that effect was therefore not erroneous. Appellant cannot complain that said waiver was not sufficiently pleaded where evidence of the acts showing said waiver was received without objection and the court accordingly made a finding on it. McClure v. Donovan, 33 Cal.2d 717, 731, 205 P.2d 17; Beckjord v. Traeger, 3 Cal. App.2d 385, 387, 39 P.2d 523.

[8] It may well be that the increasing use of the neighboring lands for commercial and industrial purposes is not relevant to the continual existence of the restriction here involved, because said restriction does not relate to use for residential purposes, and that the evidence of the intention to restrict the other lots of the subdivision to first-class residential use is insufficient as it is based solely on the size of said lots on the plat. However the decision is sufficiently supported by the finding that the restrictions were intended for the benefit of the lands retained by grantor, that all said lands were disposed of and no restriction imposed on any of them and that therefore the restrictions were waived. Further findings may then be regarded as surplusage and it is immaterial whether they are supported by the evidence. Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 321, 188 P.2d 782, and cases there cited.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

114 Cal.App.2d 311

ENGLISH v. CITY OF LONG BEACH et al.

Civ. 18980.

District Court of Appeal, Second District,
Division 1, California.

Nov. 21, 1952.

Rehearing Denied Dec. 8, 1952.

Hearing Denied Jan. 19, 1953.

Mandamus proceeding by police officer's widow to compel city to pay pension under city charter. The Superior Court of Los Angeles County, Percy Hight, J., entered judgment dismissing petition, and petitioner appealed. The District Court of Appeal, Patrosso, J. pro tem., held that pleadings raised question of fact as to whether injuries suffered prior to purported discharge of officer had caused death, and widow was entitled to have such questions determined by jury, upon her request therefor.

Judgment reversed.

1. Pleading ⚷176

Where police officer's widow sought a pension under city charter for service connected death of officer, and city alleged a judgment of Supreme Court reversing a judgment mandating that officer be reinstated to position from which he had been discharged, and ordering civil service board to set aside order sustaining discharge and to grant officer full hearing, and that board had not set aside its order prior to officer's death, widow was entitled to file traverse to city's answer disputing city's allegations, and to have allegations contained therein considered with like effect as if originally set forth in petition.

2. Mandamus ⚷174

In mandamus proceeding by police officer's widow to compel city to grant her a pension by reason of service connected death of officer, wherein city answered alleging judgment of Supreme Court reversing judgment mandating that officer be reinstated to position from which he had been discharged, and ordering civil service board to set aside order sustaining discharge and to grant officer full hearing, and that board had not as yet held hearing, and widow contended that death had resulted from injuries suffered prior to such alleged discharge, factual issue was raised by widow's contention which, if determined in her favor, required entry of judgment in her favor, and she was entitled to trial by jury thereon, upon her request therefor. Code Civ.Proc. §§ 1090, 1094.

3. Mandamus ⚷174

It is only when return to an alternative writ of mandamus raises solely questions of law that the court is authorized to proceed to hear the matter upon the pleadings, except where the application is, by stipulation, submitted upon the pleadings, in which event, affirmative allegations of answer may be taken as true if not denied.

4. Mandamus ⚷174

Where police officer's widow who, by mandamus, sought pension for service connected death of her husband, contended that injuries or sickness resulting in death had occurred prior to discharge of husband as to which civil service board had been directed by Supreme Court to grant husband a full hearing, which had not been held, widow was not required to restrict her claim to death from injuries during period prior to discharge as prerequisite to trial of issue of whether death had been caused from injury during such period, in absence of interposition of special demurrer by city.

5. Municipal Corporations ⚷218(8)

Under provision of city charter making all removals by city manager of employees in classified service subject to civil service provisions of charter, and civil service provision that no employee shall be discharged until he has been presented with reasons therefor in writing, and has been given an opportunity to be heard before board in his own defense, the discharge of employee in the classified civil service must be preceded not only by filing of charges against him with civil service board, but as well by hearing thereon before board, and until each of such events occurs, the status as an employee does not cease to exist.

6. Municipal Corporations ⚷185(12)

In view of city charter provision prohibiting discharge of classified civil service employees until filing of charges against employee with civil service board and hearing thereon before board, judgment of Supreme Court reversing a judgment mandating that police officer be reinstated to position from which he had been discharged and ordering civil service board to set aside order sustaining discharge and to grant officer full hearing did not amount to determination that officer had ceased to be an employee of the city upon the filing of charges against him with the civil service board, but effect was to declare that officer was not legally separated from his position until hearing was had by board.

7. Municipal Corporations ⚿187(6)

Under city charter provision prohibiting discharge of classified civil service employees until filing of charges against employee with civil service board and hearing thereon before board, when hearing had not been had on charges against police officer at time of officer's death, board could not thereafter enter order of dismissal which would operate retroactively to impair officer's status of member of police department, and thereby deprive his widow of any pension rights to which she might be entitled.

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Kenneth Sperry, Long Beach, for appellant.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondents.

PATROSSO, Justice pro tem.

Petitioner appeals from a judgment dismissing her petition for writ of mandate by which she sought to compel the defendant City of Long Beach, the members of its city council, and other administrative officers to grant her a widow's pension under the provisions of Section 187(4) of the city charter.

Appellant alleges that she was married to Henry W. English on December 12, 1940; that there was born as the issue of said marriage a child aged four years; that she was living with her husband at the time of his decease on April 11, 1950, and has not since remarried; that her husband was appointed to a position in the police department of the defendant city on July 16, 1942, and served regularly as a member thereof, except for such periods during which he was on authorized leave of absence, up to and until April 5, 1950, at which time he was compelled to retire from active service due to sickness caused by the discharge of his duties as a police officer; and that his death on April 11, 1950, was the result of injuries received by him during the performance of his duties as a police officer or from sickness caused or aggravated by the discharge of such duty. It is further alleged that on February 14, 1951, appellant filed an application for a widow's pension with the defendant city council but that said defendants have failed and refused to recognize petitioner's rights in the premises or to cause any pension payments to be made to her; that more than a reasonable time has expired since the filing of such application and that unless compelled to do so defendants will continue to refuse to grant her the pension to which she is entitled.

Upon the filing of the petition an alternative writ was issued to which respondents made return by filing an answer denying that petitioner's husband's death was service connected, and, while admitting that Mr. English had been appointed as a patrolman in the police department on the 16th day of July, 1942, and that he continued in this capacity until the 3rd day of August, 1945, proceeds to allege that on the last named date the city manager filed charges against him, "dismissing him from the service of the City"; that on the 12th day of September, 1945, a hearing was held before the civil service board and thereafter the board made its order sustaining the charges and approving the dismissal; that Mr. English sought and obtained a peremptory writ of mandate directing the defendants named in said action to reinstate him to the position of patrolman; that defendants therein took an appeal from said judgment and on August 31, 1948, the petitioner English obtained an order that the appeal not operate as a stay, whereupon the defendants reinstated him to the position of patrolman and he continued to work for the defendant city until April 5, 1950; that on April 17, 1950, the

Supreme Court of California reversed the decision of the trial court in the mandate proceeding insofar as it ordered the reinstatement of English but ordered the entry of a judgment directing the civil service board to set aside its order sustaining the dismissal of Mr. English and to accord him a full and fair hearing. English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22, 18 A.L.R.2d 547. It is further alleged that following the decision of the Supreme Court, on August 30, 1950, the trial court entered a judgment therein in accordance therewith but that no peremptory writ of mandate has ever been served upon the civil service board, and that the board has not set aside its previous order sustaining the dismissal of Mr. English nor has the board set the matter for hearing and that "the matter is still pending before the Civil Service Board."

[1] The hearing upon the alternative writ was thereupon continued for one week, at which time appellant filed what is denominated a traverse to respondents' answer, in which it is admitted that written charges were filed by the city manager against Mr. English as alleged in the answer and alleges that such charges were to the effect that "he had failed to pass a certain physical examination and that it appeared from certain medical reports that he had contracted a physical ailment or defect which incapacitated him from the performance of his duties as a patrolman," but denies that Mr. English was dismissed from the police department on the date upon which the charges were filed or at any time; denies that the city manager had the right or power under the city charter to bring about the discharge of Mr. English without affording him an opportunity to be heard before the civil service board, and that any purported discharge could not become effective until he had been afforded a fair hearing before said board in respect to the truth of the charges; that Mr. English filed a written denial of the charges within the time provided by the rules and regulations of the civil service board and that, as determined by the Supreme Court of California in the case previously adverted to, he had never been afforded a fair hearing before said board. It is further alleged that at all times subsequent to September 1, 1948, Mr. English "was carried on the payroll of the Police Department * * * and was certified by the Civil Service Board as being employed and performing services for the City of Long Beach in accordance with the provisions of the City Charter," and that he performed the services of a patrolman up to and including April 5, 1950, "at which time he was compelled to retire from active service by reason of a heart ailment which was directly attributable to the services performed by him as a patrolman in the Police Department of the City of Long Beach throughout the period from July 16, 1942, to April 5, 1950"; that if in fact Mr. English "had on August 3, 1945, contracted an ailment which prevented him from properly performing his duties as a patrolman * * *, said ailment was directly attributable to and caused by the services performed by him as a patrolman following his original appointment in July of 1942, and therefore was eligible to receive a disability pension at the time said written charges were filed against him in August of 1945, and regardless of whether or not it should eventually be determined by the Civil Service Board that he was physically unable to perform the duties of his position as patrolman, petitioner would be entitled to receive the death benefit pension provided by Section 187, Subd. (4) of the City Charter of the City of Long Beach"; that the Supreme Court of California had not been advised of Mr. English's death at the time it rendered its decision on April 17, 1950, and that because thereof it would be and is now impossible for the civil service board to conduct a fair hearing of the issues presented by the written charges filed on August 3, 1945. Finally it is alleged that on September 1, 1948, the civil service board of the City of Long Beach duly made and entered an order setting aside the purported dismissal of Mr. English and duly reinstated him to his position as patrolman and that at the time of his death he was a member of said department. While counsel for respondents undertake to question the propriety of the filing of this

document, it was clearly authorized, Scott v. Superior Court, 205 Cal. 525, 526, 271 P. 906, and appellant was entitled to have the allegations contained therein considered with like effect as if originally set forth in her petition.

[2, 3] We have set forth in some detail the allegations contained in the pleadings because it is in the light thereof that we must judge the propriety of the manner in which this proceeding was disposed of in the trial court. Upon the date to which the hearing had been continued counsel for appellant filed a written request for a jury trial upon the issues of fact raised by the pleadings, and requested the judge presiding to transfer the cause to a trial department inasmuch as the hearing would occupy two or three days. Counsel for respondents, however, moved the court that the proceeding be abated upon the ground that no hearing had as yet been held by the civil service board upon the charges filed against Mr. English on August 3, 1945. To this counsel for the appellant vigorously objected upon the ground, among others, that aside from what might be ultimately determined as to Mr. English's status in the police department subsequent to August 3, 1945, the pleadings raised a triable issue of fact, namely, whether his death occurred as the result of the injuries received by him during the performance of his duties as a patrolman or from sickness caused or aggravated by the discharge thereof during the time between his original appointment to the position on July 16, 1942, and August 3, 1945, throughout which period his status as a member of the department was not in question. In reply counsel for the respondents, while conceding that, if it were established that the death of appellant's husband was directly attributable to injuries or sickness incurred in the line of duty prior to August 3, 1945, she would be entitled to the relief which she seeks, urged that the motion should nonetheless be granted because the issues might be limited if a hearing upon the charges filed against Mr. English was first had before the civil service board.

The trial court granted the motion of counsel for the respondents, and, while stating that he would enter an order abating the proceeding, thereafter caused a judgment to be entered dismissing the petition and discharging the alternative writ. This action was clearly erroneous. The pleadings having tendered a factual issue which, if determined favorably to appellant, required the entry of judgment in her favor, she was entitled as of right to a trial thereon either by the court or, in the latter's discretion and as requested by counsel for appellant, by a jury. Code Civ. Proc., sec. 1090. It is only where the return to the alternative writ raises solely questions of law that the court is authorized to proceed to hear the matter upon the pleadings, Code Civ.Proc., secs. 1090, 1094, save in those instances where the application is by stipulation, submitted upon the pleadings and in which event the affirmative allegations of the answer may be taken as true if not denied. Fox v. Workman, 6 Cal.App. 633 at page 635, 92 P. 742; McClatchy v. Matthews, 135 Cal. 274, 276, 67 P. 134; Charles L. Donohoe Co. v. Superior Court, 79 Cal.App. 41, 44, 248 P. 1007; Brown v. Superior Court, 10 Cal.App.2d 365, 368, 52 P.2d 256; Vanderbush v. Board of Public Works, 62 Cal.App. 771, 775, 217 P. 785. Here, however, as previously noted, appellant did not agree to submit her application upon the pleadings but insisted upon her right to adduce testimony in support of the issues of fact presented thereby. Moreover if all of the affirmative allegations contained in respondents' answer were taken as true, they would not constitute a defense to the petition for, as already noted, and expressly conceded by counsel for respondents, proof that the death of appellant's husband occurred as a direct result of injuries or sickness arising out of the performance of his duties as patrolman prior to August 3, 1945, would have entitled appellant to judgment. Wood v. Board of Police and Fire Pension Com'rs, 49 Cal.App.2d 52, 120 P.2d 898; Holt v. Board of Police, etc., Com'rs, 86 Cal.App.2d 714, 196 P.2d 94.

[4] Nor, as contended by counsel for respondents, was appellant compelled, in order to obtain a hearing upon the factual issues thus presented, to amend her peti-

tion and restrict her claim solely to death resulting from injuries or illness sustained by her deceased husband during his period of service in the police department prior to August 3, 1945, at least in the absence of a special demurrer, and none was interposed here. The fact that a litigant may predicate her cause of action in part upon allegations of fact which she may not be able to establish upon the trial or which, if proved, would not in themselves entitle her to the relief which she seeks, does not operate to deprive her of the right to have her cause heard and determined where facts are alleged which, if proved upon the trial, would entitle her to judgment. Moreover counsel for appellant expressly offered to prove that Mr. English's death occurred as a result of injuries which he sustained *prior* to August 3, 1945, but the offer was refused by the trial court. This ruling was erroneous for if the proffered proof were made, appellant must necessarily prevail.

Since the errors above adverted to necessitate a reversal of the judgment, this opinion might well stop here without consideration of other questions presented. However, inasmuch as these will undoubtedly arise upon a retrial and counsel have discussed and invite our decision thereon, we shall undertake to dispose of them in the hope that by so doing the final determination of this proceeding may be expedited.

The primary question remaining to be determined is the status of the appellant's husband as a member of the police department during the period intervening between the filing of the charges against him on August 3, 1945, and the date of his retirement immediately preceding his death, during all of which time, following the action of the civil service board setting aside its previous order approving his dismissal and ordering his restoration to his position of patrolman, he regularly performed the duties thereof, was regularly carried on the payroll of the department, and received the compensation attached to the position.

On behalf of the respondents it is urged that when the city manager undertook to dismiss Mr. English and filed charges with the civil service board he thereupon ceased to be an employee of the police department, and that "his sole right was to be reinstated to his position by the Civil Service Board after a hearing." On the contrary counsel for appellant contends that, under a proper construction of the applicable provisions of the city charter, a dismissal of an employee in the classified service can not be effected until after the charges filed against him with the civil service board are heard and determined in the event the employee seeks such hearing. The charter provisions with which we are concerned are the following:

"Sec. 90. The powers and duties of the City Manager shall be:

> "(a) To see that all laws and ordinances are enforced.
>
> "(b) To appoint and, except as herein provided, to remove all heads or directors of the departments, and all subordinate officers, assistants, deputies, clerks, attaches and employees in both the classified and unclassified service * * *. All appointments shall be upon merit and fitness alone, *and in the classified service all appointments and removals shall be subject to the civil service provisions of this charter.* (Emphasis added.)

* * * * * *

> "Sec. 106. *No Employee in the classified service shall be discharged or reduced in rank or compensation until he has been presented with reasons for such discharge or reduction in rank or compensation specifically stated in writing, and has been given an opportunity to be heard before the Board in his own defense.* The reason for such discharge or reduction and any reply thereto by such employee, shall be in writing and filed with the Civil Service Board. Verified written charges may be filed by any qualified elector of the City of Long Beach under such rules and regulations as may be prescribed by the Civil Service Board. All charges shall be heard and trials had under such rules as the Civil Service Board may prescribe. Provided, that the provisions of this section are

at all times subject and subordinate to the provisions of Section 108. (Emphasis added.)

"Sec. 107. Any employee of any department in the city in the classified service who is suspended, reduced in rank, or dismissed from a department by the head of that department, or the City Manager, may appeal from the decision of such officer to the Civil Service Board, and such Board shall define the manner, time and place by which such appeal shall be heard. *The judgment of such Board shall be final*; Provided, that the provisions of this section are at all times subject and subordinate to the provisions of Section 108." (Emphasis added.)

Section 108 referred to in Section 107 last above noted relates to summary dismissals of non-civil service employees by the city manager with the consent of two-thirds of the city council and is without application here.

[5] All of these sections must, of course, be read and considered together, for while Section 90 empowers the city manager to remove employees in the classified service, the power thus granted is expressly made subject to the civil service provisions of the charter. Likewise, while Section 107 speaks of an employee "dismissed" by the city manager, the expression is qualified by the language immediately following granting to such an employee a right of appeal to the civil service board. These sections alone would seem to indicate that there is no finality in the act of the city manager in filing charges against an employee in the classified service, but if doubts remained upon this score, they are effectively dispelled by Section 106 which in language too clear to be misunderstood unequivocally declares that no employee in the classified service shall be discharged "*until* he has been presented with reasons for such discharge * * *, and has been given an opportunity to be heard before the Board in his own defense."

A reference to 43 Words and Phrases, page 404, discloses that the word "until" has been judicially defined as follows: "'Until' means up to a certain time, or place or event. It is a term not a condition. Federal Sign System v. Amavet, 7 La.App. 680, 682. * * * Office of word 'until' is to fix some point of time or some event, upon arrival or occurrence of which what precedes will cease to exist. Herrin v. National Fire Ins. Co. of Hartford, Conn., 46 Wyo. 330, 26 P.2d 637, * * * 'Until' means up to the time when. Hild v. Polk County, Iowa, 49 N.W.2d 206, 208. * * * The word 'until,' when used as conjunction, means 'up to a specified time'. In re Staats' Will, 272 App.Div. 139, 69 N.Y.S.2d 894, 897." Such also is the dictionary definition of the word. In Webster's New International Dictionary (2nd Ed.) when used as a preposition, it is defined as "During the whole time before; up to the time of, implying cessation or reversal at that time," and as a conjunction it is defined as "Up to the time that or when; till such time as."

If, as the foregoing clearly dictates, the discharge of an employee in the classified civil service must be preceded not only by the filing of charges against him with the civil service board but as well by a hearing thereon before the board, it necessarily follows that until each of these events occurs his status as such employee does not cease to exist.

While neither the industry of counsel nor our independent research has served to disclose any authority directly dealing with a like question arising under substantially similar statutory provisions, the conclusion indicated above finds support in the language of our Supreme Court in Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816, 818, which involved a charter provision of the city of Los Angeles reading substantially the same as Sections 106 and 107 of the charter of the City of Long Beach quoted above but with the important difference that there it was specifically provided that upon the filing of the charges with the Board of Civil Service Commissioners "such removal, discharge or suspension shall take effect." There the precise question was whether the filing of the charges with the Civil Service Commissioners operated as a discharge of the employee within the meaning of Section 112½ of the charter which required one claiming to have been illegally discharged to file a written application for reinstatement within 90 days "following the date on which it is claimed that such person was first illegally * * * discharged." In returning a negative answer thereto the court said in 26 Cal.2d at page 720, 160 P.2d at page 818: "Although the department is given the power to discharge, it may only do so for cause. The grounds of the discharge must be set forth in its notice of discharge which must be both filed with the board and served upon the employee affected; *thus indicating that the department's action is not to be deemed final, but rather as a preliminary step in a series.* It is true the section states that upon the filing of the notice the discharge shall take effect, but, rather than implying finality to the action, that provision means in effect that the employee shall be required to cease working in his position and that the department need not accept his services pending the ultimate disposition of the matter, thus establishing the policy of relieving the department from the detrimental aspects of having, in the interim, actively working on its staff, an employee considered unsatisfactory. Following the filing and service of the notice there are administrative remedies which may be pursued by the employee. Thus, within fifteen days the board may, on its own motion, or on the employee's application, made within five days, 'investigate the grounds' for the discharge. If the board finds that the grounds for the discharge are insufficient and that the employee is fit and suitable, it may reinstate him. Although no express provision is made therefor, we believe it follows by necessary implication that the board may, as it did in the instant case, make an order sustaining the discharge. *Presumably if the board did not act on its own motion within the fifteen days, or if no application for relief were filed by the employee within the time specified, the discharge would become final and effective at the expiration of such time.* The proceedings before the board are in the nature of administrative remedies or process which are a part of the ultimate discharge. If the employee fails to pursue those remedies the court will not listen to his plea for reinstatement inasmuch as he would not have exhausted his administrative remedy (see Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715), *thus further indicating that the procedure before the board is a part of the entire scheme for the discharge of civil service employees. That thought is further evinced by the final statement in section 112(a) that the action of the board is final and conclusive. One phase of the finality would be that the discharge proceedings had been completed and were effective for all purposes when the board made its order.*" (Emphasis added.)

Here not only is there absent from the charter express language to the effect that the dismissal of a civil service employee shall take effect upon the filing of charges against him with the civil service board or that he shall stand suspended pending a hearing thereon, but we fail to discern any language therein which by necessary implication suggests that such was the intent of the framers of the charter. As already indicated the ordinary and usual meaning of the language employed is to the contrary. Nor do we perceive that the conclusion expressed herein is in any wise inconsistent with the decision of the Supreme Court in English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22, 18 A.L.R.2d 547 as suggested by respondents. As we read the opinion we fail to find therein any intimation that the court was of the view or intended to declare that Mr. English's dismissal became effective upon the filing of the charges against him with the civil service board; rather the opposite would appear to be true for the real point decided was that, not having been accorded a fair hearing, the order of the civil service board purporting to sustain his dismissal was a nullity. Accordingly the trial court was ordered to enter a judgment directing the civil service board to set aside its previous order sustaining Mr. English's dismissal and to afford him a full and fair hearing. The entry by the trial court of such a judgment pursuant to the Supreme Court's mandate unquestionably constitutes a final adjudication that the proceedings theretofore had looking to Mr. English's dismissal were abortive. From this it can only be concluded that until a full and fair hearing as directed had been accorded him and an order duly made by the civil service board sustaining his dismissal, his status as a member of the police department remained unimpaired.

[6] Neither are we impressed by respondents' argument that the holding of the Supreme Court that the trial court erred in ordering his reinstatement necessarily implies that it was of the view that he ceased to be an employee of the city upon the filing of the charges against him with the civil service board when considered in the light of the precise question determined, namely, that he had not been legally discharged from his position. In stating that the judgment of the superior court should not have directed the reinstatement of Mr. English, we do not believe the Supreme Court intended thereby any more than that the city was not compelled to abandon its efforts to bring about his discharge but should be left free to do so upon a proper compliance with the provisions of the charter. This affirmation by the court of the right of the civil service board to conduct a hearing upon the charges despite its previous abortive attempt to do so does not, however, presuppose or rest upon a determination that Mr. English had been effectively separated from his position upon the mere filing of charges against him or that an order of discharge, if made by the board following a proper hearing, would operate retroactively to accomplish this result. It it be conceded, as it must, that the effect of the Supreme Court's decision was to declare that, as of the date of the rendition thereof, Mr. English had not been legally separated from his position of patrolman, it seems wholly illogical to argue, as do respondents, that the court nonetheless entertained the view that he had ceased to be an employee of the city upon a date almost two years previously by virtue of the very proceedings which the court declared ineffectual to accomplish this result.

Throughout respondents' brief there occurs the argument that the civil service board is the only body authorized by law to determine whether a contract of employment existed between the city and Mr. English following the filing of charges against him. This assumption is palpably erroneous. The only power vested in the board by the charter in this respect is to conduct a hearing upon the charges and thereafter make a finding thereon. The question as to the status of a civil service employee following the filing of such charges and pending a hearing thereon is purely one of law which the courts alone are competent to determine.

All this aside, it must not be overlooked that long prior to the decision of the Supreme Court the civil service board had vacated its previous order approving the dismissal of Mr. English and ordered him reinstated to duty as of August 3, 1945. While we appreciate, as respondents insist, that this order was made by the board under the compulsion of the peremptory writ of mandate issued by the superior court, and likewise agree that it did not operate to estop the board, following the decision of the Supreme Court, from proceeding with a hearing of the charges against him if his employment had not previously been terminated by his retirement or death, in evaluating respondents' contention we may well consider the consequences to Mr. English if he had refused to report for duty in compliance with the civil service board's order. Can it be doubted that in such event he would thereby have subjected himself to discharge? Thus, although obliged to perform the duties of the position at the risk of being discharged therefrom, acceptance of respondents' argument would compel the conclusion that in the performance thereof he was not doing so as an employee of the city. As a necessary consequence, if, while so engaged and undertaking to effect the arrest of one charged with the commission of a felony, he was killed by the person sought to be apprehended, petitioner would be denied the pension benefits granted by the charter to widows of members of the department killed in line of duty. Were the language of the charter less clear than it is, we yet would hesitate to adopt a construction thereof productive of such absurd and harsh results.

[7] In light of what has already been said, we need not pause to inquire whether, by reason of Mr. English's death, a full and fair hearing could now be held before the civil service board upon the charges filed against him. This because such a hearing would be but an idle act, for if the board undertook to make an order of dismissal following such hearing, the same could not operate retroactively to impair his status as a member of the police department at the time of his retirement and subsequent death.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

BOARD OF EDUCATION OF CITY OF LOS ANGELES v. SWAN.*

Civ. 19102.

District Court of Appeal, Second District, Division 3, California.

Nov. 21, 1952.

Rehearing Denied Dec. 16, 1952.

Hearing Granted Jan. 19, 1953.

Dismissal proceedings, wherein the Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment that plaintiff board of education could dismiss defendant from her position as a teacher, and defendant appealed. The District Court of Appeal, Vallee, J., held, inter alia, that the findings supported the judgment.

Affirmed.

1. Schools and School Districts 🔑141(4)

A particular act or omission of teacher may constitute grounds for dismissal for more than one reason, and therefore, in dismissal proceeding, it was not error to charge the same act as constituting several causes for dismissal under statute. Education Code, § 13521.

2. Schools and School Districts 🔑141(4)

Insubordination and failure to recognize constituted authority may render teacher unfit for service in school even though her qualifications are otherwise sufficient. Education Code, § 13531.

3. Schools and School Districts 🔑141(4)

Wilful refusal of teacher to obey reasonable rules and regulations of employing board of education is insubordination; and teacher's refusal to accept assignment which board of education has power to make constitutes violation of school laws for which she may be dismissed. Education Code, § 13531.

4. Schools and School Districts 🔑141(5)

Dismissal proceeding is limited to determination of whether charges against teacher are true, and, if so found, whether they justify dismissal. Education Code, § 13531.

5. Schools and School Districts 🔑141(5)

Findings supported judgment dismissing school teacher for unprofessional conduct, evident unfitness for service, and persistent violation of, or refusal to obey, school laws and reasonable regulations prescribed by state and city boards of education. Education Code, § 13531.

6. Schools and School Districts 🔑141(5)

Even though there was no evidence, in dismissal proceeding, as to what constituted professional or unprofessional conduct, trial court did not err in concluding that charges found to be true constituted unprofessional conduct on part of teacher. Education Code, §§ 10, 13529.

7. Schools and School Districts 🔑141(5)

Where there is legal right to do act, motive which induces act is of no importance, and therefore in proceedings for dismissal of teacher, it was not error to strike special defenses constituting an attack on motives of board and not tending to excuse, explain, or deny acts or omissions charged.

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* Subsequent opinion 261 P.2d 261.

8. Schools and School Districts ⚿141(5)

In dismissal proceeding, defenses that board's instruction to defendant to report for teaching assignments had not been made in good faith, that her dismissal had not been for causes specified but rather because of testimony before grand jury and addresses to press and other groups in which she criticized board constituted attacks on motives of board rather than excuses for, explanations of, or denial of acts or omissions charged, and were therefore properly stricken. Education Code, § 13531.

9. Schools and School Districts ⚿141(5)

Judgment determining that board could dismiss teacher was not direction to board to dismiss her nor was it compulsory but was permissive only. Education Code, §§ 13529, 13552.

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Owen J. Brady, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, and Clarence H. Langstaff, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment determining that plaintiff may dismiss her as a permanent teacher of the Los Angeles City School District.

Defendant has been employed by the district as a teacher and as a principal for more than 29 years. During the period involved in the charges, she was principal of the Wilshire Crest school in Los Angeles. On April 26, 1951, a written statement of charges was formulated by plaintiff charging there existed causes for her dismissal. On April 27, 1951, a written notice was given defendant of plaintiff's intention to dismiss her, together with a copy of the charges. Defendant demanded a hearing of the charges in accordance with section 13529 of the Education Code. On receipt of the demand, plaintiff elected to file this action alleging there existed as causes for dismissal the charges theretofore formulated and served upon her. The judgment was that plaintiff may dismiss defendant. Defendant appeals.

The court found that the following charges are true:

1. "[A]bout March 13, 1951, before a regularly scheduled meeting of the Wilshire Crest Parent Teachers Association, the defendant made derogatory statements concerning the Superintendent of Schools and criticized the Board of Education for bringing him to Los Angeles."

2. "[A]bout March 13, 1951, before a regularly scheduled meeting of the Wilshire Crest Parent Teachers Association, the defendant stated that she had been called before the Los Angeles City Board of Education and had 'spit in their faces.' "

3. "[D]efendant failed and refused to report for teaching assignments beginning April 9, 1951, and April 23, 1951, when instructed to do so by the Superintendent of Schools, acting under instructions of the Board of Education."

4. "[D]uring the school year 1949–50 the defendant requested Esther Pauline Ash, a teacher in the Wilshire Crest School, of which the defendant was then principal, to join a teachers' union as a favor to the defendant in violation of Rule 16.291 of the Administrative Guide of the Los Angeles City School District."

5. "[D]efendant caused to be paid to the Wilshire Crest Parent Teachers Association the total proceeds received from a joint Parent Teachers Association and student body carnival contrary to the permit issued, authorizing the holding of said carnival, which provided that said proceeds be divided equally between the Parent Teachers Association and the student body. That it is true that defendant accepted for the Wilshire Crest School nine phonographs, purchased by the Wilshire Crest Parent Teachers Association from the proceeds of said

carnival without obtaining the approval of the student body finance section of the administrative office of the plaintiff contrary to the established rules and policies relating to student body finance adopted by the plaintiff."

6. "[D]uring the three years last past the defendant has persistently failed to attend meetings called by the Superintendent of Schools and his deputies and assistants to assist school principals in their work. That it is true that Rule 16.271 of the Administrative Guide of the Los Angeles City Schools, 1940 edition, requires principals to attend such meetings."

7. "[D]uring the 1950–51 school year the defendant excused approximately fifty children of the first and second grades a few minutes before two o'clock in the afternoon. That it is true that the defendant continued to permit the dismissal of said children before two o'clock after the Assistant Superintendent of schools, Mrs. Mannatt, had informed defendant of her disapproval of said practice. That it is true that rule 1104 of the Rules and Regulations of Los Angeles City School District, 1950 edition, and Rule 3 of Division 5 of the Administrative Code of the State of California, provide that the afternoon closing hour for first and second grades is 2:00 p. m."

8. "[I]n February, 1950, the defendant issued a written bulletin to the teachers of the Wilshire Crest School of which the defendant was principal, suggesting that said teachers have duplicate classroom keys made to take home with them. That it is true that Rule 15.11, Administrative Guide of Los Angeles City School District, 1940 edition, provides that keys to classrooms shall be left in the office of the principal of the school."

9. "[A]bout March 13, 1951, at a Parent Teachers Association meeting in the Wilshire Crest School of which the defendant was principal, the defendant called the Superintendent of Schools and other school administrators 'henchmen,' and the Board of Education Office 'The Little Kremlin.' That it is true that the defendant after said Parent Teachers Association meeting had adjourned, permitted the persons present to hold a citizens meeting in the Wilshire Crest School. That it is true that no permit had been issued for the holding of said citizens meeting. That it is true that Civic Center Permit No. 15847, dated February 20, 1951, issued for the holding of said Parent Teachers Association meeting did not include therein permission to hold said citizens meeting. That it is true that the rules of the plaintiff regulating the holding of public meetings in school buildings require a permit for all such meetings."

The court concluded that sufficient grounds exist to constitute: 1) unprofessional conduct; 2) evident unfitness for service; and 3) persistent violation of or refusal to obey the school laws of the state and reasonable regulations prescribed for the government of the public schools by the State Board of Education and by the Board of Education of Los Angeles—as causes for her dismissal. The court also concluded that the charges found to be true constitute sufficient grounds for the dismissal of defendant.

Section 13521 of the Education Code in relevant part provides: "No permanent employee shall be dismissed except for one or more of the following causes:

"(a) Immoral or unprofessional conduct. * * *

"(e) Evident unfitness for service. * * *

"(g) Persistent violation of or refusal to obey the school laws of the State or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him."

[1] Plaintiff included the same charge under one or more causes for dismissal. For example, the charge that the super-

intendent of schools, acting under instructions of plaintiff, notified defendant in writing that she was to report for a teaching assignment beginning April 9, 1951, but that she failed and refused, and still refuses, to report for such assignment, was included under the causes unprofessional conduct, evident unfitness for service, and persistent violation of or refusal to obey school laws and regulations. Defendant first contends it was error to include the same charge under more than one cause of dismissal.

Assuming the point is properly before us, since defendant did not demur to the complaint which includes the charges, as she could have done, Ed.Code, section 13531, the contention is without merit. There is nothing in the sections of the Education Code providing for this proceeding which prohibits the practice. Obviously, a particular act or omission of a teacher may constitute unprofessional conduct, evident unfitness for service, and a persistent violation of or refusal to obey pertinent laws and regulations.

Fresno City High School Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668, 671, relied on by defendant is not analogous. In that case the court merely stated that each of the causes for removal listed in the code refers to "act or omission not necessarily included in any of the others." This is not a statement that the acts or omissions charged cannot be included in one or more causes for removal.

Defendant concedes the findings are supported by substantial evidence. She contends the facts found do not sustain the judgment; that they do not constitute cause for her dismissal.

Defendant, at a meeting of the Parent Teachers Association of the school of which she was principal, said she had been called before plaintiff and had "spit in their faces," made derogatory statements concerning the superintendent of schools and criticized plaintiff for bringing him to Los Angeles, called the superintendent of schools and other school administrators "henchmen" and plaintiff's office "The Little Kremlin." Defendant has persistently failed to attend meetings called to assist principals in their work, in violation of the rule requiring such attendance. She persistently violated a rule which requires that keys to classrooms be left in the office of the principal. She refused to accept teaching assignments.

[2] A teacher, and more particularly a principal, in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and conduct are likely to be followed by the children taught. "An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The example of a teacher who is continually insubordinate and who refuses to recognize constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though her other qualifications may be sufficient." Johnson v. Taft School Dist., 19 Cal.App. 2d 405, 408, 65 P.2d 912, 913; Voorhees, Law of Public Schools, p. 136.

[3] A teacher's refusal to accept an assignment which the board of education has the power to make constitutes a violation of school laws for which she may be dismissed. Appeal of Ganaposki, 332 Pa. 550, 2 A.2d 742, 119 A.L.R. 815; Commonwealth ex rel. Wesenberg v. School Dist. of City of Bethlehem, 148 Pa.Super. 250, 24 A.2d 673, 676; Consolidated School Dist. No. 4, Bryan County v. Millis, 192 Okl. 687, 139 P.2d 183; Hamberlin v. Tangipahoa Parish School Board, 210 La. 483, 27 So.2d 307, 310–12. The wilful refusal of a teacher to obey reasonable rules and regulations of the employing board of education is insubordination. State ex rel. Steele v. Board of Education of Fairfield, 252 Ala. 254, 40 So.2d 689, 695.

[4, 5] A proceeding of this character is limited to a determination of whether the charges are true, and if so found, whether

they justify dismissal. Board of Education v. Jewett, 21 Cal.App.2d 64, 72, 68 P.2d 404. We cannot say as a matter of law that the charges found to be true do not justify dismissal. We hold therefore that the findings support the judgment.

Plaintiff did not produce any evidence at the trial that the charges constitute unprofessional conduct. Defendant contends the court erred in concluding that the charges found to be true constitute unprofessional conduct "where there is no evidence introduced as to what constitutes professional or unprofessional conduct." The argument is that there is no basis in case law for a conclusion of unprofessional conduct; that the cases holding that a teacher was guilty of unprofessional conduct[1] had to do with acts of a teacher in the presence of his pupils; that what constitutes unprofessional conduct is not a matter of common knowledge; and that the matter is not one of which the court may take judicial knowledge.

The term "unprofessional conduct" as used in the Education Code is to be construed according to its common and approved usage, having regard to the context in which the legislature used it. Ed.Code, § 10. The word "unprofessional" is defined in Websters' New International Dictionary, 2d Ed., as "Not professional; esp., designating language, action, or method, not befitting one's profession; as, *unprofessional* language." It is a relative term without technical meaning. "Unprofessional conduct" is defined in 66 C.J. 55 as "that which violates the rules or ethical code of a profession or such conduct which is unbecoming a member of a profession in good standing."

The Education Code, section 13529, expressly empowers the court to determine whether the acts and omissions charged, if found to be true, constitute unprofessional conduct. It says that the court shall "inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings."

In Board of Education v. Ballou, 21 Cal. App.2d 52, at page 55, 68 P.2d 389, 391, it was said: "The Legislature has placed upon the judges the duty of determining whether a teacher should be dismissed when charges such as incompetency are filed." In Midway School Dist. v. Griffeath, 29 Cal.2d 13, at page 17, 172 P.2d 857, 859, the court declared: "Where an accused teacher demands a hearing, the duty of determining the issues as to the truth of the charges and their sufficiency to support a dismissal is placed by the statute on the superior court, whose judgment, appropriate to the evidence and the findings, terminates the matter." A reading of the entire opinion in the Griffeath case clearly demonstrates that the question whether acts and omissions charged and found to be true constitute unprofessional conduct is a judicial question, and that the responsibility for determining the question is on the trial court. In Board of Education v. Jewett, 21 Cal.App.2d 64, 68 P.2d 404, it was held as a matter of law that violation of the oath required of a teacher constituted unprofessional conduct. Conduct which produced serious friction in the school and showed insubordination and a refusal to conform to the instructions and requirements of a teacher's superior has been held to constitute unprofessional conduct. Johnson v. Taft School Dist., 19 Cal.App.2d 405, 65 P.2d 912. A teacher who takes a leave of absence without consent of the school board in violation of a rule is guilty of "unprofessional conduct". Evard v. Board of Education, 64 Cal.App. 2d 745, 149 P.2d 413.

In Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783, a high school teacher in the city schools of Sacramento, before his class in session, advocated the election of a particular candidate for the office of county superintendent of schools.

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[1] Alexander v. Manton J. U. School Dist., 82 Cal.App. 330, 255 P. 516; Board of Education v. Jewett, 21 Cal.App.2d 64, 68 P.2d 404; Gaderer v. Grossmont Union H. S. Dist., 124 Cal.App. 686, 13 P. 2d 401; Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783.

It was charged that such conduct was unprofessional. After a hearing, the Board of Education[2] found that the teacher was guilty "of unprofessional conduct." On appeal from a judgment denying reinstatement after suspension, the court stated in 66 Cal.App. at page 162, 225 P. at page 785: "[W]e agree with the trial judge that the charges against the appellant are clearly embraced within the contemplation of subdivision (j) of section 1609 as expressed in the general language 'unprofessional conduct.' * * * [I]t is claimed that the term 'unprofessional conduct' is so general, so undefined, so vague, that there is no way by which what is meant by it can be determined, that any act might be claimed to constitute it, and that to make it a ground upon which a teacher might be removed would be to make his employment dependent upon the whim and caprice of changing official authority. As a consequence it is claimed that the cause 'unprofessional conduct' as a ground of removal is meaningless and illegal and that no charge can be said to legally come within it, and that the charges here attempted, having no foundation, are void. If this be true it leaves California with a very large number of teachers to whom she has given permanent employment with no power reserved in her boards of education or other governing authority to prohibit the grossest misuse of their privileges. If 'unprofessional conduct' as a ground of dismissal is void because it leaves too much to the judgment or discretion of the board of education in determining what constitutes it, then 'immoral' conduct, 'incompetence,' and 'evident unfitness for teaching' must likewise be held void for the same reason, and practically all of the vitally necessary power of the boards will be stripped from them. A decision which involved such radical consequences should be reluctantly arrived at and reached only for reasons which are unanswerable. * * * In this state the court sustained a charge alleging 'evident unfitness to teach,' 'insubordination,' and 'unprofessional conduct' against a teacher. McKenzie v. Board of Education, 1 Cal.App. 406, 82 P. 392. * * * As has been stated, if plaintiff is correct here in claiming that the school board has no power to proceed against a teacher for any breach of what the statute designates as 'unprofessional conduct' because the term is too general, and leaves too much to the discretion and judgment of the board, then other statutory grounds of removal are equally invalid, and the school boards of this state are almost totally without authority over the teachers they employ. This is not only so of California, but is equally true of every other state in the Union so far as a thorough search has enabled me to discover. The statutes of the several states provide for removal of teachers or the revocation of their certificates generally for such causes as 'general neglect of the business of the school,' 'general neglect,' 'lack of patriotism or refinement,' that the teacher lacked the qualities of success, that the teacher has 'become unworthy,' for 'other demoralizing vice,' 'neglect of duty,' 'willful neglect of duty,' or 'when he has become unworthy to remain a teacher.' * * * [T]he calling [of teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment. * * * [T]he teacher is intrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. How can all of these things be provided for and offenses against them be particularly specified in a single statute? * * *.

"In the case of attorneys they may be disbarred for 'any act involving moral turpitude.' Section 287, Code Civ.Proc. In the army a commission can be revoked for 'conduct unbecoming an officer and a gentleman.' Articles of War, subd. 95. In the church, where the highest degree of personal propriety is demanded, governing bodies are almost unrestricted in their discretionary power to deal with offenses against a discipline that is itself unwritten." See also: Alexander v. Manton J. U. School Dist., 82 Cal.App. 330, 255 P. 516.

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[2] At that time (1924) the Board of Education was empowered to hear charges.

[6] We hold that the court did not err in concluding that the charges found to be true constitute unprofessional conduct without evidence "as to what constitutes professional or unprofessional conduct."

[7, 8] The answer of defendant sets up three separate defenses: 1) the instructions to defendant to report for teaching assignments were not made in good faith; 2) she was not dismissed for any of the causes specified in the Education Code but because she had appeared before the grand jury of Los Angeles county and had testified to conditions in connection with plaintiff, its members and employees, and had addressed the press, private groups, friends, and other interested individuals relative to the matters about which she had testified; 3) her dismissal was part of plaintiff's calculated plan to remove her from her means of livelihood and deprive her of her right of free speech. On motion these defenses were stricken from the answer. Defendant assigns error. There was no error.

The special defenses are all an attack on the motives of the board. They are not defenses which tend to excuse, explain, or deny the acts or omissions charged. It is settled that where there is a legal right to do an act, the motive which induces the act is of no importance. Neuwald v. Brock, 12 Cal.2d 662, 675–6, 86 P.2d 1047; Monahan v. Dept. of Water and Power, 48 Cal.App.2d 746, 754, 120 P.2d 730. The deletion of the special defenses did not bar defendant from introducing "elements of justification, provocation, excuse, motive, circumstances surrounding the act, and the like." Evidence as to those elements was admissible on the issue of whether the charges, if true, constitute sufficient grounds for dismissal. Ed.Code, sec. 13529.

[9] The judgment which determines that the board may dismiss defendant is not a direction to the board to dismiss her, nor is it compulsory; it is permissive only. Ed.Code, sec. 13552; Midway School Dist. v. Griffeath, 29 Cal.2d 13, 17, 172 P.2d 857. The present board may or may not dismiss defendant at its pleasure.

Affirmed.

SHINN, P. J., concurs.

WOOD, J., did not participate.

THOMPSON v. CITY OF LONG BEACH et al.*

Civ. 19006.

District Court of Appeal, Second District,
Division 3, California.

Nov. 20, 1952.

Hearing Granted Jan. 15, 1953.

Proceeding for writ of mandamus to compel a city and its administrative officials to revoke an order discharging plaintiff from plaintiff's employment as a stenographer in classified civil service of city, and for other relief. The Superior Court of Los Angeles County, Percy Hight, J., rendered a judgment denying the writ and the plaintiff appealed. The District Court of Appeal, Vallée, J., held that implied findings of civil service board, on which was based dismissal of plaintiff on ground that plaintiff was incapacitated from properly performing stenographic duties because plaintiff had lost practically all vision in right eye, which was corrected through use of lenses, and because plaintiff had no vision in left eye due to immature cataract, were not supported by substantial evidence in light of whole record, and that such findings therefore constituted an abuse of discretion.

Judgment reversed with directions.

1. Mandamus 🔑173

On proceeding for writ of mandamus to compel a city and its administrative officials to revoke an order discharging plaintiff from plaintiff's employment as a stenographer in classified civil service of

* Subsequent opinion 259 P.2d 649.

city, brought by a plaintiff who was discharged as not being ready, able, and willing to perform her duties because of physical disability, plaintiff was not entitled to a trial de novo and was entitled to formal hearing on complete record of board, which included pleadings, all notices and orders issued by board, written evidence, exhibits admitted or rejected, transcript of all proceedings, and any other papers in case. Code Civ.Proc. § 1094.5.

2. Mandamus 🔑173

When question in proceeding for writ of mandamus is whether findings of local administrative body are supported by substantial evidence in light of whole record, petitioner is not entitled to introduce evidence, nor to submit to court anything which was not before administrative body. Code Civ.Proc. § 1094.5.

3. Municipal Corporations 🔑216(2)

Rule of civil service board of City of Long Beach which requires an employee in classified civil service of city to pass a physical examination before resuming duties following leave of absence of more than six months, and which provides that failure to pass examination should constitute grounds for suspension or dismissal, is valid.

4. Municipal Corporations 🔑218(8)

Rule of civil service board of City of Long Beach, which requires employee in classified civil service of city to pass a physical examination before resuming duties following leave of absence of more than six months, and which provides that failure to pass examination should constitute grounds for suspension or dismissal, does not leave determination of whether employee shall be suspended or dismissed to uncontrolled discretion of examining physicians, and their findings and conclusions form merely part of evidence to be considered by civil service board in determining whether employee shall be suspended or dismissed.

5. Municipal Corporations 🔑218(8)

Officer seeking to bring about discharge of employee in classified civil service of City of Long Beach has burden to establish charge made in written notice of discharge by substantial evidence, otherwise such employee is entitled to retain position.

6. Administrative Law and Procedure 🔑761

Where it is claimed findings of administrative body are not supported by evidence, and court is authorized by law to exercise its independent judgment on evidence, abuse of discretion on part of administrative body is established if court determines findings are not supported by weight of evidence, and in all other cases abuse of discretion is established if court determines findings are not supported by substantial evidence in light of whole record. Code Civ.Proc. § 1094.5(b, c).

7. Appeal and Error 🔑1010(1)
Certiorari 🔑68

Under general rule in certiorari and on appeal from a judgment of a court, when it is claimed evidence is insufficient to support verdict or findings, it is sufficient if evidence supporting result is substantial when considered by itself.

8. Administrative Law and Procedure 🔑789, 790, 791, 793

When supported by substantial evidence in light of whole record, administrative agency's choice between two conflicting views may not be displaced even though reviewing court could justifiably have made a different choice had matter been before it de novo, and reviewing court is not permitted to weigh evidence, resolve its conflicting inferences, or draw its own conclusions therefrom, but reviewing court is not bound by a finding of administrative agency which has no reasonable basis in evidence.

9. Evidence 🔑538

A medical expert is not qualified as a witness unless it is shown that he is familiar with standards required of physicians under similar circumstances.

10. Evidence 🔑555

Opinions of medical expert are to be tested by a consideration of facts from which those opinions are derived, and such opinions are arbitrary and without substantial value as evidence if such facts do not justify conclusions.

11. Municipal Corporations ⟹218(9)

Implied findings of civil service board, on which was based discharge of a stenographer in classified civil service of city on ground that such stenographer was incapacitated from properly performing stenographic duties because she had lost practically all vision in right eye, which was corrected through use of lenses, and because employee had no vision in left eye due to immature cataract, were not supported by substantial evidence in light of whole record which showed that stenographer's impairment of vision did not incapacitate her from doing her work, so that such findings constituted an abuse of discretion.

12. Municipal Corporations ⟹220(1)

The right to receive salary is inherent in status of a civil service employee of city.

13. Municipal Corporations ⟹220(6)

A civil service employee of city who has been unlawfully deprived of his position is entitled to recover amount of his accrued salary during period he is prevented from performing his duties, less amount he has received from private or public employment during such period.

14. Municipal Corporations ⟹220(2)

A classified employee of civil service board of City of Long Beach was not discharged, under provisions of charter of city, by merely presenting such employee with reasons for discharge in writing, and such employee retained her civil service status until such employee was legally discharged notwithstanding charges were previously served against such employee, and such employee was entitled to salary until legally discharged, less any amount employee received from private or public employment during such period. St.1921, pp. 2057, 2091, 2093, §§ 1 et seq., 99, 106, 107; St.1923, pp. 1628, 1629, §§ 90, 106, 108; St.1933, p. 3011, § 98.

15. Municipal Corporations ⟹216(1)

The civil service board of the City of Long Beach acts as a local administrative tribunal and has power to make adjudications of fact in connection with matters properly submitted to it.

16. Administrative Law and Procedure ⟹819

Where determinative powers are vested in a local administrative agency and court finds its decision lacks evidentiary basis, proper procedure is to remand matter to agency for further and proper proceedings.

17. Mandamus ⟹187(10)

Where civil service board of city abused discretion in finding that classified civil service employee was incapacitated from properly performing her stenographic duties, judgment denying writ of mandamus to such stenographer who had been discharged because of such alleged incapacity would be reversed on appeal to District Court of Appeal, with direction to trial court to make findings of fact and conclusions of law in accord with view of District Court of Appeal.

Kenneth Sperry, Long Beach, for appellant.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., and John R. Nimocks, Deputy City Atty., all of Long Beach, for respondents.

VALLÉE, Justice.

Petitioner brought this proceeding in the superior court for a writ of mandamus to compel respondent City of Long Beach and its administrative officials to revoke an order discharging her from her employment as a stenographer in the classified civil service of the city, and to command them to pay her salary from September 7, 1949. The writ was denied. Plaintiff appeals from the judgment.

Petitioner was appointed a stenographer in the classified civil service of the city in 1923. In 1929, she was transferred to a similar position with the Civil Service Board, called the board, in which position she remained until the latter part of 1947. At that time, she was granted a leave of absence because of an impairment of her vision, which interfered with the performance of her duties. In August, 1948, she was given an indefinite suspension. In March, 1949, she had an operation for the removal of a cataract from her right eye, and thereafter wore corrective glasses.

On September 1, 1949, the board terminated the suspension and directed petitioner to report for duty. On September 6th she was notified to report for a physical examination. On September 8th she was given a physical examination by a board of physicians, as required by a rule of the board following a leave of absence of more than 6 months. The rule provides that failure to pass such examination shall constitute ground for suspension or dismissal. The report of the board of physicians was to the effect that petitioner's general physical condition was normal; that she had practically no vision in her left eye due to an immature cataract; that vision in her right eye was 20/400, which was corrected by the use of glasses to 20/20–3; and that she was "not employable at present." On September 15, 1949, the board adopted a resolution approving the report and denying petitioner re-employment.

On May 15, 1950, a notice of discharge was served on petitioner. After objections thereto and on June 7, 1950, the secretary of the board filed with the board, and served on petitioner, another written notice of discharge which stated: "That the medical examination given you by the Board of Physicians of the City of Long Beach on the 8th day of September, 1949, establishes that you have contracted a physical ailment or defect which incapacitates you for the proper performance of the duties of your position, namely, practically no vision in the right eye but this is corrected through use of lenses and no vision in the left eye due to immature cataract * * *," and that she could within 5 days file an answer with the board. Petitioner filed an answer denying that she failed to pass a physical examination based on her ability to perform the duties of a stenographer, and denying that she had contracted any physical ailment or defect.

On June 29, 1950, the board held a hearing at which petitioner and her counsel were present. Evidence was received on behalf of the board and of petitioner. At the conclusion of the hearing on June 29, 1950, by agreement with petitioner, the board adopted a resolution that an eye specialist be appointed to examine petitioner, and that interrogatories be submitted to him by the board and by petitioner. On July 13, 1950, the board selected Dr. Dennis Smith, an eye specialist, to examine petitioner. The chairman of the board notified Dr. Smith of his selection by a letter, which stated "[t]here was a dispute in the evidence and the Board is requesting you to examine Miss Thompson and give the Board your independent opinion on Miss Thompson's condition," and propounded a number of questions which will be referred to, and transmitted a copy of the duties fixed for the position of stenographer.

On September 5, 1950, the board held a further hearing at which neither petitioner nor her attorney was present. The board received in evidence a report from Dr. Smith and a report of Dr. Behrend, assistant health officer of the city, and adopted a resolution removing petitioner from her employment. On January 29, 1951, after the alternative writ of mandamus issued in this proceeding, a special meeting of the board was held, at which the order of dismissal of September 5, 1950, was set aside and the matter restored to the calendar "because of apparent irregularities in the hearing of September 5, 1950." After notice to petitioner and her attorney and two continuances, the board, on February 28, 1951, without taking further evidence, approved and sustained the charges dismissing petitioner as a stenographer.

The trial court found that petitioner was not, after September 7, 1949, ready, able and willing to perform the duties of a stenographer in the classified service of the city, and that there was sufficient evidence offered and received to support the finding of the board. Petitioner contends these findings are without substantial support in the evidence. After a review of the record, we are constrained to agree.

At the trial in the superior court, the record before the board was received in evidence; petitioner and other witnesses testified without objection; and the rule of the board to which we have referred was read in evidence.

[1, 2] Petitioner was not entitled to a trial *de novo* in the superior court. She was entitled to a formal hearing on the complete record of the board, which includes the pleadings, all notices and orders issued by the board, the written evidence, the exhibits admitted or rejected, a transcript of all proceedings, and any other papers in the case. When the question in a proceeding for a writ of mandamus under section 1094.5 of the Code of Civil Procedure is whether the findings of a local administrative body are supported by substantial evidence in the light of the whole record, the petitioner is not entitled to introduce evidence, nor to submit to the court anything which was not before the administrative body. Code Civ.Proc. § 1094.5; Greif v. Dullea, 66 Cal.App.2d 986, 1009, 153 P.2d 581.

[3, 4] The rule of the board which requires an employee to take and pass a physical examination before resuming work after an extended absence, and which provides that failure to pass the examination shall constitute grounds for his suspension or dismissal, is a valid rule. But failure to pass the examination does not automatically disqualify an employee. The rule does not leave the determination of whether or not the employee shall be suspended or dismissed to the uncontrolled discretion of the examining physicians. Their findings and conclusions form merely part of the evidence to be considered by the board in determining whether the employee shall be suspended or dismissed. English v. City of Long Beach, 35 Cal.2d 155, 157–158, 217 P.2d 22, 18 A.L.R.2d 547. Thus, the only question properly before the board was whether the condition of petitioner's eyes was such as to incapacitate her from performing her duties as a stenographer—not whether she had failed to pass the physical examination.

[5] The burden is on the officer seeking to bring about the discharge of a civil service employee—in the present case the civil service board itself—to establish the charge made in the written notice of discharge by substantial evidence; and unless this was done, petitioner is entitled to retain her position. La Prade v. Department of Water & Power, 27 Cal.2d 47, 50–51, 162 P.2d 13.

The following is a resume of the record before the board.

The health officer of the city testified he did not examine petitioner; he examined the report of the physicians who made the examination on September 8, 1949, and he approved the conclusion that petitioner was unable to perform her work as a stenographer by virtue of her defect; there was a marked visual defect in the right eye which was corrected, and there was practically no vision at all in her left eye, according to the report; vision in her right eye had been corrected to 20/20, which is regarded as perfect; the vision of a stenographer should have a fairly flawless acuity; a person with one good eye only could do satisfactory work, but a person with vision in both eyes can perform in a more satisfactory manner; he had never specialized "in the eyes," or fitted glasses; Dr. Godwin is an outstanding eye specialist.

Dr. Christie, a physician and surgeon, one of those who made the examination on September 8, 1949, testified that the condition of petitioner's vision was as shown on the report, and that: "due to her poor vision of the right eye and being blind in the left eye" she was not fit for employment as a stenographer; she would not be fit for employment in the army, therefore she would not be fit for employment in the city; he is not an eye specialist; he has had no experience in hiring stenographic help; he did not consult with an oculist or eye specialist with respect to petitioner's vision.

Dr. McDowell, an osteopathic physician and surgeon, one of those who made the examination of September 8, 1949, testified to the same effect as Dr. Christie, and that: petitioner's vision would preclude her giving adequate service as a stenographer, he felt she would be handicapped; he does general surgery, not eye surgery; he does not make refractions; the examination was conducted by having petitioner stand about 20 feet from the customary eye chart, a card with letters of different sizes on it, no other equipment was used, and nothing further was done than having her read the chart with and without glasses; the examination took about 5 minutes.

Dr. Johns, a physician and surgeon, one of those who made the examination of September 8, 1949, testified to the same effect as Dr. Christie, and that: petitioner's impaired vision disqualified her to perform the duties of a stenographer; he had not examined her since September, 1949; he has no knowledge of her ability to do stenographic work as of May, 1950, or since; it is 12 years since he has done any refraction; the only test made in the examination was for distance; some people are not able to see at a distance but are able to do close work.

Dr. Godwin, called by petitioner, testified that: he is a physician and surgeon; his practice is exclusively the care and treatment of the eyes; he examined petitioner in the week before the hearing; she had been operated on for cataract in March, 1949; with the use of glasses, vision in her right eye is normal as far as visual acuity is concerned; vision in the left eye is that of the perception of light and the ability to count fingers at a distance of 18 inches; there is no reason in the world why petitioner cannot do stenographic work; the fact that a person has only one good eye does not make any appreciable difference in her ability to read; a person with one eye is handicapped where those functions requiring fine judgment of distance are concerned, which is not true of secretarial or stenographic work; a one-eyed person has less strain on long hours of effort than a two-eyed person because he does not have to keep the muscles of the eyes in such adjustment that both eyes are pointed the same way—the other eye pays no attention; the fact that petitioner has poor vision in her left eye would not have any effect upon her filling a stenographic position—it could have no bearing whatsoever; men in the army carry ratings as secretary and as stenographer with one eye gone; Wiley Post flew around the world with just one good eye; there is no difference at all in the ability of a person with one eye and two eyes to read—it has no bearing on efficiency.

A report of Dr. Weeks, an eye specialist, was offered by petitioner, and received in evidence. It stated that: he operated on petitioner's right eye for cataract extraction on March 15, 1949; the operation was entirely successful; final vision on August 22, 1949, was right eye corrected 20/20 with Jaeger 1, near vision at 14 inches with ease; petitioner was equipped with bifocal glasses, and has excellent distance and near vision; so far as stenographic work is concerned, she is equipped for visual acuity at a near point of 14 inches and will be slightly blurred for intermediate distance without a trifocal glass; these findings prevailed on June 29, 1950.

Miss Davis, a teacher in Long Beach City College, called by petitioner, testified that: she has had seven years' experience in hiring and supervising stenographic help; petitioner, since February, 1950, has been taking a course at the college in "Skill Development," starting with typewriting; she has been in attendance a total of 112 hours; she has done very fine work as a typist; her speed is above average; I was not conscious of her having poor vision; I did not know about it until quite recently; I did not know she had only one good eye.

Miss Huff, a teacher in Long Beach City College, called by petitioner, testified that: beginning in February, 1950, she supervised petitioner in a class in shorthand; she did not notice that petitioner had any difficulty in doing the work of a stenographer; petitioner did not appear to have any difficulty with her vision; she took difficult dictation at 100 words a minute, and short business letters at 120 words a minute, which is average; petitioner has been able to do stenographic work for the past 4 months.

Petitioner testified that: since September, 1949, she has been able to perform the work she was doing before her leave of absence; she is able to read (she read minutes of the board rapidly and without hesitation); since she has had glasses she has had no difficulty in reading; she reads constantly; she took stenographic work at City College to brush up, to review shorthand and typewriting, so that she would not lose her speed.

The report of Dr. Dennis Smith, the eye specialist appointed by the board, was as follows: "I have completed the examination of Miss Helen C. Thompson requested by your Board and wish to submit herewith my report:

"On March 15, 1949, Miss Thompson had a cataract removed from her right eye by Dr. Carrol Weeks of Los Angeles. The operation was without complication, was done with the minimum of disfigurement and the result has been very satisfactory and excellent. As always, vision without glasses in the operated eye is much reduced (2/200) but since the operation left a round and unimpaired pupil she can see objects about her quite accurately even with no glass. With her correcting glass the vision is 20/25, and she can see some letters on the 20/20 line which is adjudged as the basis of normal vision. For reading or near vision she sees 15/21 which is about 90% normal. The vision of the left eye is limited to light perception only. The peripheral visual field of her right eye is unimpaired. Ocular tension and the external condition were both normal."

The questions asked Dr. Smith by the board and his answers thereto were as follows:

> "Q. Is Miss Thompson physically able to perform the duties of Stenographer if she is required to work five days a week, eight hours a day? A. As far as her eyes are concerned Miss Thompson is physically able to perform the duties of a stenographer working eight hours a day and five days a week. Aside from the general statement that she appears well and strong I have no opinion to offer as to her general medical condition as I made no such examination.
>
> "Q. Could Miss Thompson's employment as a Stenographer aggravate the existing condition of her eyes? If so, to what extent? A. It is my belief that employment as a stenographer would not aggravate the existing condition of her eyes.
>
> "Q. If Miss Thompson's vision should become further impaired, could it logically be contended that the impairment was brought about by reason of the performance of the duties of Stenographer? A. It is my belief that if later her vision, or the eyes, should become further impaired it would be due to factors inherent in the eyes or in her general medical condition or to extraneous conditions and not brought about by reason of the performance of the duties as a stenographer.
>
> "Q. Suppose Miss Thompson's glasses should become broken or knocked from her head, could she observe objects or obstructions which might bring about possible injury? A. Without her glasses her vision is very much reduced but she can observe objects and obstructions, and although she obviously had to move more cautiously and slowly she got about several rooms in my office without any complication.
>
> "Q. Can Miss Thompson detect changes in levels and visualize distances? A. Even without her glasses she could detect changes in levels and vizualize distances to a fair degree. With her glasses this was markedly improved but, since she has the use of only one eye, her estimation of heights and her projection of objects in distance or space is below normal. This is true of any person with but one usable eye and is not because of her cataract operation per se. It is difficult to express this impairment in measureable terms, and varies considerably with individuals. Some persons with two eyes seeing normally may even have greatly impaired depth perception and appreciation of spatial relations.
>
> "In summary, I would state that I find little inherent in the eye condi-

> tion which would be a serious or positive handicap to her work as a stenographer.
>
> "To my certain knowledge other persons following successful cataract extraction have continued their previous occupation as a teacher, minister, physician and surgeon, farmer, truck driver, carpenter, cook, insurance agent, tailor, realtor, eye physician, pharmacist, barber, wood carver, chemist, and many other trades and professions with visual requirements fully as exacting as that of stenography.
>
> "It is conceivable that certain conditions might arise in a specific type of work which would lessen one's value and proficiency as compared to that of others with normal eyes, but, in general, it is often surprising how well adapted a cataract patient may become."

The report of Dr. Behrend, the assistant health officer of the city, contained the visual requirements for stenographers in several governmental agencies and one private company.

[6] In a proceeding of this nature when it is claimed the findings of the administrative body are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines the findings are not supported "by substantial evidence in the light of the whole record." Code Civ.Proc. § 1094.5, subds. (b, c). In the present case, the court was not authorized by law to exercise its independent judgment on the evidence. 2 Cal.Jur.2d, p. 341, § 206, p. 363, § 220. Hence the question before the trial court was, and before this court is, whether the findings of the board are supported by substantial evidence in the light of the whole record.

[7] The statute says an abuse of discretion is established if the court determines that the findings are not supported "by substantial evidence *in the light of the whole record.*" Code Civ.Proc. § 1094.5, subd. (c). Italics added. The phrase "in the light of the whole record" has meaning and must be given effect. Under the general rule in certiorari and on appeal from a judgment of a court, when it is claimed the evidence is insufficient to support the verdict or findings, it is sufficient if the evidence supporting the result is substantial when considered by itself: when the reviewing court can find in the record evidence which viewed in isolation substantiates the result. The meaning of the rule of substantial evidence in the light of the whole record was stated in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 464–466, 95 L.Ed. 456, 467–469, as follows:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes [the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., and the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq.] that courts consider the whole record. * * * Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. * * * The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. * * *
>
> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. * * * The Board's findings are en-

> titled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

[8] A reviewing court is not permitted to weigh the evidence, resolve its conflicting inferences, or draw its own conclusions therefrom. When supported by substantial evidence in the light of the whole record, the administrative agency's choice between two conflicting views may not be displaced even though the reviewing court would justifiably have made a different choice had the matter been before it *de novo*. However, a reviewing court should not consider itself bound by a finding of an administrative agency which has no reasonable basis in the evidence. West v. Industrial Accident Comm., 79 Cal.App.2d 711, 720, 180 P.2d 972.

[9, 10] "A medical expert is not qualified as a witness unless it is shown that he is familiar with the standards required of physicians under similar circumstances. * * * The competency of an expert 'is in every case a relative one, i. e. relative to the topic about which the person is asked to make his statement.'" Huffman v. Lindquist, 37 Cal.2d 465, 476, 234 P.2d 34, 41. Expert testimony is no stronger than the facts upon which it is predicated. Owings v. Industrial Accident Comm., 31 Cal.2d 689, 692, 192 P.2d 1; West v. Industrial Accident Comm., 79 Cal.App.2d 711, 716, 180 P.2d 972; Blankenfeld v. Industrial Accident Comm., 36 Cal.App.2d 690, 698, 98 P.2d 584. The opinions of medical experts "are to be tested by a consideration of the facts from which those opinions are derived; and if those facts do not justify the conclusions, the opinions are arbitrary, and without substantial value as evidence." In re Guardianship of Waite, 14 Cal.2d 727, 731, 97 P.2d 238, 240. "The rule is well settled in this state that, as against positive, uncontradicted factual evidence applicable to the particular case, particularly when given by attending physicians, opinions of experts as to probabilities or possibilities (particularly when partially based on erroneous assumptions) creates no conflict. [Citations.] While it is true that an appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting evidence, it is equally well settled that for that rule to apply the conflict must be substantial and real and not fanciful or fictitious." Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 733–734, 135 P.2d 396, 403. Mere conclusions are not sufficient to meet the definition of substantial evidence as against positive, direct evidence of a fact. Thoreau v. Industrial Accident Comm., 120 Cal.App. 67, 73, 7 P.2d 767.

Applying the rules stated, it is apparent that the implied findings of the board are not supported by substantial evidence in the light of the whole record. The only evidence that the condition of petitioner's eyes was such that she could not perform the duties of a stenographer came from the general practitioners and the health officer. The opinions of the general practitioners were based not on tests such as were given by the eye specialists to determine petitioner's ability to do stenographic work, but on distance tests, made more than 8 months before the hearing. No equipment was used in making the examination except an eye chart which is a card with a number of letters of different sizes on it. All that was done was to have petitioner stand 20 feet from the chart and have her read to see what letters she could read at that distance with and without glasses. The test took five minutes. They made no test of close vision. They made no test to determine whether petitioner's visual acuity was such as to interfere with her ability to do stenographic work. No effort was made to ascertain whether she could read rapidly or readily, other than to read the chart. None of the general practitioners had any knowledge of, or had consulted an eye specialist to determine, the effect of a cataract removal on petitioner's ability to do stenographic work. None of them expressed an opinion as to her ability to perform her duties at the time the charges were filed. Their opinions appear to have been based largely on the false premise that the board had adopted a rule which required that stenographers have 20/20 vision in both eyes.

One of the general practitioners, Dr. McDowell, testified there is a difference between testing close vision and testing distance vision. He said he could not say that a person with only one eye would be handicapped in close reading. Dr. Johns, also one of the general practitioners, testified he had no knowledge as to petitioner's ability to do stenographic work on May 15, 1950, (8 months after the examination), or thereafter; and that no effort was made in the examination by the medical board to test petitioner's close vision or to determine her ability to read other than to read the chart.

The opinion of the health officer as to petitioner's ability, based as it was solely on a reading of the report of the examining general practitioners, is of no value. However, he testified that a person with one good eye could do satisfactory stenographic work.

In its final analysis, all the testimony of the general practitioners and the health officer amounted to was that, according to a standard test for distance vision, petitioner had no vision in her left eye, and that vision in her right eye with corrective glasses was 20/20–3. Having made no tests to determine her ability to read, other than to read the chart, or to perform the duties of a stenographer, their testimony concerning her ability in that respect was purely speculative. Their opinions, based as they were solely on a distance test–on facts which do not justify their conclusions–are in fact and in law no evidence at all on the question whether petitioner was able to perform satisfactory work as a stenographer. They do not create any real conflict in the evidence and do not support the charge on which petitioner was dismissed.

All of the eye specialists, including the specialist appointed by the board, expressed the unqualified opinion that petitioner was able to satisfactorily perform the duties of a stenographer working eight hours a day, five days a week. Their opinions were positive, unequivocal, uncontradicted, and based on tests made for the very purpose of determining petitioner's ability to perform satisfactory work as a stenographer.

The only direct evidence with respect to petitioner's ability to perform her duties was that of the two teachers in Long Beach City College, and the fact that at the hearing petitioner read minutes of the board rapidly and without hesitation. The teachers, persons of experience, the only witnesses who had an opportunity to observe petitioner's work as a stenographer, found that she did her work satisfactorily. Their testimony is undisputed. Neither one of them knew at the time that she had only one eye.

The conclusion of the board appears to have been based on the theory that it was "in the best interests of the city" to discharge petitioner as recited in its minutes of September 5, 1950. But the rule provides that in order to discharge an employee he must have "some physical ailment or defect which incapacitates him from the proper performance of the duties of his position."

The implied findings of the board are contrary to the evidence read as a whole. The evidence before the board is susceptible of but one reasonable conclusion; that petitioner is ready, willing, and able to perform the duties of a stenographer and has no physical ailment or defect which incapacitates her from the proper performance of the duties of her position. There was no substantial evidence to the contrary.

[11] We conclude that the implied findings of the board are not supported by substantial evidence in the light of the whole record. The finding of the trial court to the effect that the findings of the board are supported by substantial evidence is therefore erroneous.

On September 1, 1949, the board terminated petitioner's suspension and directed that she report for duty. She was so notified and reported. The record is not clear as to the date she was notified nor as to the date she reported for duty. However, she reported for the physical examination on September 8, 1949. Petitioner contends she is entitled to payment of her salary from the date she reported to work, which on the record we take to be September 8, 1949, until she is lawfully discharged. Respondents contend she was discharged the date the charges were served on her and that she is not entitled to salary thereafter. Petitioner was in the classified civil service with permanent status. The charges on which the matter was heard were served on her on June 7, 1950. A notice of discharge and charges had been served on her on May 15, 1950; but when she objected to their sufficiency, they were superseded by a new notice and charges served on June 7th. Petitioner filed an answer and notice of appeal.

Section 90 of the charter of Long Beach provides that in the classified service all removals shall be subject to the civil service provisions of the charter. Stat.1923, p. 1628. Section 98 provides that members of the civil service board shall be appointed by the city council. Stat.1933, p. 3011. Section 99 provides that the board may appoint such subordinates as the council may by ordinance prescribe. Stat.1921, pp. 2057, 2091. Section 106, as originally enacted in 1921, read: "No employee in the classified service shall be discharged or reduced in rank or compensation until he has been presented with reasons for such discharge or reduction in rank or compensation specifically stated in writing, and has been given an opportunity to be heard before the board in his own defense. The reason for such discharge or reduction, and any reply in writing thereto by such employee, shall be filed with the civil service board; PROVIDED, that the provisions of this section are at all times subject and subordinate to the provisions of section 108." Stat.1921, p. 2093. In 1923, section 106 was amended to read as it now does by adding the following after the semicolon in the second sentence and before the word "Provided," "Verified written charges may be filed by any qualified elector of the city of Long Beach under such rules and regulations as may be prescribed by the civil service board. All charges shall be heard and trials had under such rules as the civil service board may prescribe." Stat.1923, p. 1628.[1]

Section 107 reads: "Any employee of any department in the city in the classified service who is suspended, reduced in rank, or dismissed from a department by the head of that department, or the city manager, may appeal from the decision of such officer to the civil service board, and such board shall define the manner, time, and place by which such appeal shall be heard. The judgment of such board shall be final; PROVIDED, that the provisions of this section are at all times subject and subordinate to the provisions of section 108." Stat.1921, p. 2093. Section 108 provides for summary dismissal of appointive officers and employees by the city manager with the consent of two-thirds of the council. Stat.1923, p. 1629.

We are of the opinion that an employee of the civil service board with civil service status is not discharged by merely presenting the employee with reasons for his discharge in writing. Section 106 specifically says that no employee in the classified service shall be discharged until he "has been given an opportunity to be heard before the board in his own defense", and that all charges shall be heard and trials had under rules prescribed by the board. Section 107 merely establishes an orderly procedure by which the action in presenting the notice of discharge shall be examined. Cf. Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 720, 160 P.2d 816. As said in the Steen case, 26 Cal.2d at page 720, 160 P.2d at page 818: "The grounds of the discharge must be set forth in its notice of discharge which must be both filed with the board and served upon the employee affected; thus indicating that the department's action is not to be deemed final, but rather as a preliminary step in a series."

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[1] Section 106 in full now reads: "No employee in the classified service shall be discharged or reduced in rank or compensation until he has been presented with reasons for such discharge or reduction in rank or compensation specifically stated in writing, and has been given an opportunity to be heard before the board in his own defense. The reason for such discharge or reduction and any reply thereto by such employee, shall be in writing and filed with the civil service board. Verified written charges may be filed by any qualified elector of the city of Long Beach under such rules and regulations as may be prescribed by the civil service board. All charges shall be heard and trials had under such rules as the civil service board may prescribe. Provided, that the provisions of this section are at all times subject and subordinate to the provisions of Section 108."

This construction is in accord with the rules of the board which provide: "Sec. 9. *Failure to Appeal or Answer.* If the accused employee fails to appeal within the time provided herein, the order of reduction, or suspension, or dismissal shall be final without any action of the Board. If the accused employee files a written notice of appeal and does not file his written answer, as herein provided, then such failure shall be construed as an admission of the truth of the charges made against him, and an order for the removal of such employee shall be entered forthwith and filed by the Board." It is also consonant with the provisions of the former charter of Long Beach. See Stat.1915, p. 1681, § 23.

[12, 13] Petitioner retains her civil service status until she is legally discharged. Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816; Ahlstedt v. Board of Education, 79 Cal.App.2d 845, 180 P.2d 949; Borch v. City of Los Angeles, 94 Cal.App.2d 458, 461–462, 210 P.2d 736. A discharge is not effective until the board on substantial evidence has so ordered. Ahlstedt v. Board of Education, 79 Cal. App.2d 845, 180 P.2d 949; Spaletta v. Kelly, 30 Cal.App.2d 656, 662, 86 P.2d 1074; Cf. Curl v. Pacific Home, 108 Cal.App.2d 655, 661, 239 P.2d 481. The right to receive salary is inherent in the status of a civil service employee. Such an employee who has been unlawfully deprived of his position is entitled to recover the amount of his accrued salary during the period he is prevented from performing his duties, less the amount he has received from private or public employment during said period. Buckman v. Board of Supervisors, 37 Cal.2d 305, 307, 231 P.2d 496; Ahlstedt v. Board of Education, 79 Cal.App.2d 845, 857, 180 P.2d 949; Stockton v. Department of Employment, 25 Cal.2d 264, 153 P.2d 741.

[14] Petitioner, pursuant to order of the board, reported for work at least as early as September 8, 1949. She is therefore entitled to her salary from that date until she is legally discharged or her employment otherwise legally terminated, less the amount she has received from private or public employment during that period.

[15, 16] The Long Beach Civil Service Board acts as a local administrative tribunal, and it has power to make adjudications of fact in connection with matters properly submitted to it. English v. City of Long Beach, 35 Cal.2d 155, 158, 217 P.2d 22, 18 A.L.R.2d 547. Where determinative powers are vested in a local administrative agency and the court finds its decision lacks evidentiary basis, the proper procedure is to remand the matter to the agency for further and proper proceedings. Fascination, Inc., v. Hoover, 39 Cal.2d 260, 268, 246 P.2d 656, and cases there cited.

[17] The judgment is reversed with directions to the superior court to make findings of fact and conclusions of law in accord with the views we have expressed, and to render judgment remanding the matter to the civil service board with directions to set aside its order of February 28, 1951, and for further and proper proceedings; and the superior court is further directed to take evidence as to the remuneration received by petitioner from public or private employment and to render judgment for petitioner for the salary applicable to her position as stenographer from September 8, 1949, less the amount received by her from public or private employment.

SHINN, P. J., and PARKER WOOD, J., concur.

114 Cal.App.2d 347

DOYLE v. MILLER et al.

Civ. 15270.

District Court of Appeal, First District,
Division 1, California.
Nov. 24, 1952.

Petition for mandamus by a dismissed captain with a permanent civil service status in fire department of the City of Berkeley alleging that he was entitled to a hearing prior to dismissal and that notice thereof did not adequately state the reasons therefor. From an adverse judgment in the Superior Court in and for the County of Alameda, Cecil Mosbacher, J., the petitioner appeals. The District Court of Appeal, Wood, Fred B., J., held that the notice of dismissal was adequate and that the only hearing to which the captain was entitled was a hearing after and not before his dismissal.

Judgment affirmed.

1. Municipal Corporations 🔑198(3)

Under charter of the City of Berkeley the city manager had power to dismiss plaintiff from his position as fire captain without cause, notice or hearing except as limited by ordinance rule, or regulation adopted by the city council making inapplicable requirement of a fire department regulation adopted by the fire chief with the approval of the city manager. St. 1923, p. 1543, § 28; St.1909, p. 1232, § 49 (56).

2. Municipal Corporations 🔑198(3)

Under charter of the City of Berkeley and ordinances pertaining to civil service and rules and regulations, the only hearing to which a captain with permanent civil service status in the fire department was entitled to was a hearing after and not before his dismissal by a board that had power to make recommendations to the city manager and not to reverse his decision. St. 1909, p. 1208; St.1921, p. 2023, § 115; Const. art. 11, § 6.

3. Officers 🔑72(1)

If by statute an officer or civil service employee may not be removed except for cause an opportunity for a full hearing to accomplish his removal must be afforded unless the statute expressly negatives the necessity of a hearing.

4. Municipal Corporations 🔑198(3)

Written statement of reasons for dismissal of a captain with permanent civil service status in fire department of the City of Berkeley was sufficient in view of the evidence that captain understood the reasons for his dismissal. St.1923, p. 1543, § 28; St.1909, p. 1232, § 49(56).

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Richard F. McCarthy, Oakland, for appellant.

Fred C. Hutchinson, City Atty., Robert T. Anderson, Asst. City Atty., Berkeley, for respondents.

FRED B. WOOD, Justice.

Plaintiff was a captain with permanent civil service status in the fire department of the City of Berkeley. June 14, 1949, he was dismissed by the city manager without a hearing and was given written notice of dismissal.

He petitioned for a writ of mandamus claiming that he was entitled to a hearing prior to dismissal and that the notice of dismissal did not adequately state the reasons for the dismissal. He asked for reinstatement as of March 15, 1949, with accrued and accruing salary, retirement and other rights and benefits, and an opportunity to be heard in his own defense. The trial court found against plaintiff upon all issues and rendered judgment dismissing his petition and denying him any relief.

(1) *The asserted right to a hearing prior to dismissal* depends primarily upon the applicability of a fire department regulation adopted by the fire chief and approved by the city manager under authority of an ordinance organizing and creating the several departments and bureaus of the city.* A separate ordinance and regulations adopted in furtherance of its provisions dealt with appointments, promotions, demotions and

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* That ordinance authorized the adoption of rules and regulations "for the administration, discipline, equipment and uniforms of members and officers" of the fire department.

The regulation declared every member

dismissals in the city civil service and did not provide for a hearing prior to dismissal.

To determine which set of regulations governs, we turn first to the city charter. Adopted in 1909, Stats.1909, Res.Ch. 17, p. 1208, the charter was amended in 1921 to provide that the "City of Berkeley shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter * * *." Stats.1921, Res.Ch. 16, p. 2021, § 115, p. 2023. In this manner, the city took advantage of the home rule amendment of 1914 to section 6 of Article XI of the State Constitution. See West Coast Advertising Co. v. San Francisco, 14 Cal. 2d 516, 521, 95 P.2d 138.

What limitations relevant to our inquiry does the charter impose? First, the charter vests the power of dismissal in the city manager. "He shall have the power, and it shall be his duty: * * * (b) Except as otherwise provided in this charter, to appoint, discipline or remove all heads or directors of departments, chief officials and all subordinate officers and employees of the City, subject to the Civil Service provision of this charter. * * *" Berkeley Charter, § 28, Stats.1923, Res. Ch. 20, p. 1537, at page 1543. The charter does not "otherwise provide" concerning the appointment, discipline or removal of any officer or employee in the fire department of the city. The charter contains a significant provision concerning civil service regulations: "Sec. 49. As the legislative organ of the city, the council, subject to the provisions and restrictions of this charter, shall have power: * * * (56) To establish a bureau of civil service and to appoint a commission, to serve without compensation, to administer the same under rules and regulations to be made by the council. * * *" Stats.1909, Res. Ch. 17, p. 1208 at pages 1232 and 1240.

[1] This means that the city manager had a direct grant of power from the charter to dismiss the plaintiff from his position as fire captain, without cause, notice, or hearing except as limited by ordinance, rule, or regulation *adopted by the city council.* This renders inapplicable and unavailable to plaintiff the hearing requirement of the fire department regulation *adopted by the fire chief with the approval of the city manager.*

The ordinance pertaining to the civil service (No. 2342–N.S.) contains a clear expression of the city council's intent that that ordinance and rules and regulations established under it shall apply to dismissals from the city civil service. Section 4 of the ordinance declares: "Pursuant to the provisions of Section 28 of Article VII of the Charter of the City of Berkeley and in accordance with the provisions of this ordinance and the rules established hereunder, the City Manager shall retain power to make transfers, promotions, demotions, reinstatements, lay-offs, and to suspend or dismiss employees, subject to the provisions of this ordinance and the rules established hereunder * * *." Other provisions of this ordinance create a personnel board, define the general powers of the board, and prescribe certain requirements concerning notices and hearings. Section 12 provides that the tenure of every employee holding a position shall be during good behavior and proved fitness, "but any officer or employee may be removed or otherwise disciplined as provided by this ordinance and the rules established hereunder." It then declares that "Any employee in the competitive service who has been demoted, suspended, dismissed or reduced in pay, shall be entitled to receive a written statement of the reasons

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or employee of the fire department subject to "reprimand, suspension, reduction in rank, deduction of pay or dismissal * * * for any of the following causes * * * after having been given an opportunity to be heard in his own defense."

The ordinance, in delegating the rule-making power in respect to "discipline," may or may not have embraced "dismissal" and "reduction in rank," a question which need not be decided in view of our conclusion that the fire department regulation is inapplicable.

for such action within three days, and he shall have three days' time thereafter within which to answer in writing thereto. Copies of such charges and answer shall be filed with the Chairman of the Personnel Board and the City Manager. Within ten days from the date of filing his answer to the written charges, or in the event such written charges have not been made available to him within the time prescribed, then within ten days after the action taken to demote, dismiss, or reduce the pay of the employee, he may file a written demand with the Chairman of the Personnel Board requesting a hearing before the Board. The Board shall then investigate the case and conduct a hearing as provided by Section 13 of this ordinance and by the rules established hereunder." Section 13 gives the personnel board the right to investigate any complaint made by an employee relative to any situation affecting his employment status, the procedure for the hearing of the complaint to be set forth in the rules, the hearing to be public, and "the findings and recommendations to the City Manager of the Personnel Board" to be a matter of public record. Section 13 concludes: "Neither the action of the Personnel Board nor any subsequent action taken by the City Manager on the recommendations of the Board shall be reviewable in any court. The action of the City Manager on the recommendation of the Personnel Board shall be final and conclusive."

The ordinance gave plaintiff, at most, a hearing by the board only after discharge by the manager, with power in the board only to make recommendations to the manager, not to reverse or modify his decision. Plaintiff has been offered a hearing after his dismissal as provided by this ordinance but has refused it, claiming a right to reinstatement and back salary.

The personnel rules make no change in this respect. Section 2 of Rule XV declares that a civil servant "may be discharged at any time by the City Manager, but if the probationary period has been completed, then such discharge must be for a cause. Any employee who has been discharged shall be entitled to receive a written statement of the reasons for such action as provided in the Personnel Ordinance and these rules." That does not signify a hearing before dismissal. Rule XVI (like section 13 of the ordinance) characterizes the action of the personnel board (after hearing the complaint of a civil servant) as "findings and recommendations," and directs that copies thereof be delivered "to the City Manager and to the employee affected by such findings and recommendations."

[2] The conclusion is inescapable that the only hearing to which plaintiff was entitled was a hearing after, not before, his dismissal, a hearing by a board that has power only to make recommendations to the city manager, not to reverse or modify his decision when he dismisses a civil servant.

[3] Plaintiff stresses the requirement of Rule XV that the discharge of a civil servant who has completed his probationary period "be for a cause" and cites a number of decisions to the effect that such a requirement denotes a full and formal hearing or trial to establish the cause, including Steen v. Board of Civil Service Comrs., 26 Cal.2d 716, 723, 160 P.2d 816, and La Prade v. Department of Water & Power, 27 Cal.2d 47, 50, 162 P.2d 13. This rule of interpretation applies, of course, when the statute, charter or ordinance which prohibits removal except for cause does not negative an inference of an intent to require a hearing. In the Steen case the Supreme Court significantly expressed this rule of interpretation in these words: "The rule is firmly established that if by statute an officer or civil service employee may not be removed or discharged except for cause, the clear implication is that there be afforded an opportunity for a full hearing to accomplish his removal; that *unless the statute expressly negatives the necessity of a hearing,* common fairness and justice compel the inclusion of such a requirement by implication." 26 Cal.2d at page 723, 160 P.2d at page 820; emphasis added. In our case, the Berkeley person-

nel rules, and the ordinance under which these rules were established, *expressly negative the necessity of such a hearing.*

[4] (2) *Upon the day of his dismissal plaintiff received a written statement of the reasons for his dismissal* as provided in the personnel ordinance and rules. This statement was addressed to plaintiff, was signed by the fire chief, quoted that portion of section 12 of the ordinance (above quoted) which declared his right to request a hearing before the personnel board, informed plaintiff that a leave of absence theretofore granted had been cancelled and his services with the city terminated. It also said: "[t]he reason for such cancellation of your Leave of Absence and your termination as an employee of the City of Berkeley was due to violation of Section 8, of General Orders, Part One, Fire Department Rules and Regulations which reads, 'Commit any act for which he may be imprisoned whether on or off duty, in uniform or otherwise.'"

We think this was a sufficient "statement of the reasons" for the dismissal, viewed in the light of the following facts. February 12, 1949, plaintiff was involved in an automobile accident, arrested and charged with manslaughter. May 9 he was convicted of misdemeanor manslaughter. June 2 he was placed upon probation for two years conditioned that he serve the first six months of that period in a county jail. Meanwhile, fire chief Meinheit had several conversations with plaintiff concerning the latter's status. The first of these was on February 12 when plaintiff was informed that if the case ended up with him going to jail, he would probably lose his job, to which plaintiff said "I understand that." They discussed the rules and regulations, and plaintiff said he knew the rules and regulations. Later, plaintiff was suspended for three days and was notified thereof. At the end of the suspension he came into the office and he and Meinheit discussed a leave of absence, Meinheit suggesting that plaintiff ask for a leave, which he did, it being the understanding, discussed by them at the time, that if there was any imprisonment involved, the chief would have no choice but to do what eventually was done. About March 15 plaintiff was given a one-year leave of absence without pay, the leave actually commencing March 23 because of nine days' of vacation earned but not yet taken. The day before sentencing in the criminal case, plaintiff was in the chief's office; they again discussed the element of possible imprisonment and Meinheit told plaintiff that in a sentencing in such a case, the chief had no choice but to recommend plaintiff's dismissal, and plaintiff said "I understand that."

Upon rebuttal plaintiff denied that upon any of those occasions he said he was familiar with the rules or anything to that effect. Plaintiff admitted, however, that about February 12 Meinheit told him if he were sentenced to prison he would probably lose his job; that in the latter part of May, Meinheit told him practically the same thing, that if he were imprisoned he would lose his job; and that on June 1, the day before the sentencing, plaintiff called Meinheit on the phone asking how things looked for plaintiff and Meinheit "practically repeated the same thing." Upon cross-examination, plaintiff admitted he was at the time familiar with the rules and regulations of the fire department; knew that he was subject to discharge if he committed an act for which he might be imprisoned.

Three days after receipt of notice of dismissal plaintiff filed with the city manager, the personnel board and the city attorney, his answer and written demand requesting a hearing under the personnel ordinance. In that document he demonstrated that he understood the reason for his dismissal by his statement therein that the action of the city manager in dismissing him "was and is excessive and not consistent with and not warranted under the circumstances, the undersigned having already been subjected to trial and punishment and the expenses incident thereto" and "is not lawful in that it places the undersigned twice in jeopardy, the undersigned having already been suspended from his employment for a period of 30 days for the same offense charged in said action and set forth in the letter and personnel action referred to herein."

In view of these circumstances, there can be no doubt that the notice of dismissal constituted an adequate "statement of the reasons" for his dismissal.

The conclusions thus far expressed render unnecessary the consideration of other questions discussed by the parties upon this appeal.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

114 Cal.App.2d 549

FITZGERALD v. FITZGERALD.

Civ. 4452.

District Court of Appeal, Fourth District, California.

Dec. 3, 1952.

Rehearing Denied Dec. 19, 1952.

Hearing Denied Jan. 22, 1953.

Wife brought action against husband for divorce, and husband filed a cross complaint. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgment for wife, and husband appealed from those portions of the judgment declaring that certain realty was held in joint tenancy. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that all realty standing in names of parties as joint tenants was, in fact, joint tenancy property.

Judgment affirmed.

1. Husband and Wife 🔑14(3)

In action by wife for divorce, evidence sustained finding that all realty standing in names of husband and wife as joint tenants was, in fact, joint tenancy property, and was not husband's separate property.

2. Divorce 🔑203

Where wife's complaint in divorce suit alleged that realty was community property, and asked that it be so adjudicated, but prayer also asked for such other and further relief as might be proper, and husband's answer and cross-complaint alleged that realty was separate property of husband, and case was mainly tried on issue whether realty was in fact held in joint tenancy, wife did not waive right to claim any interest in realty as a joint tenant by pleading that realty was community property.

3. Divorce 🔑253

Trial court by finding in divorce suit that joint tenancies in realty were in fact created, impliedly found against husband's contention that no gift of realty to wife had been intended, and question whether all money, with which realty was purchased, was owned by husband before marriage to wife was not a controlling factor, and judgment in favor of wife was not required to be reversed, on ground that court failed to find that money was owned by husband prior to marriage.

◆

Gerald E. Kerrin, Los Angeles, for appellant.

Cunningham, Parry & Holcomb, San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for divorce on the ground of cruelty. The complaint listed three parcels of real property as being the community property of the parties and, among other things prayed for one-half of that property and for such other and further relief as the court might deem proper. The defendant filed an answer and cross-complaint in which he denied the existence of any community property, and alleged that all of the property in question was his separate property. The court found, among other things, that all property standing in the names of the parties as joint tenants is in fact joint tenancy property, and that the property standing in the names of the parties separately is in fact their separate property. An interlocutory decree was entered providing that the plaintiff is entitled to a divorce, awarding her the custody of a minor child, and disposing of the property in accordance with the findings. The defendant has appealed, attacking only the portions of the findings and judgment which have the effect of holding that certain of the properties were held in joint tenancy.

These parties were married in Wisconsin in 1944. They moved to this state in 1946, and purchased three parcels of real property in Long Beach. The first was an old apartment house, which later burned. A part of the purchase price was paid in cash and a trust deed given for the balance, title being taken in the names of both parties as joint tenants. Another parcel was purchased, partly for cash and with the balance payable in monthly installments, the title to which was also taken in both names as joint tenants. This property was later sold at a profit. The appellant then purchased a home in Long Beach, paying cash and title being taken in his name alone.

In 1948, a mountain resort property with cabins in San Bernardino County was purchased, part of the purchase price being paid in cash and title being taken in the names of both parties as joint tenants. In 1949 another near-by cabin property was purchased, part of the purchase price being paid in cash and title taken in the names of both parties as joint tenants. After coming to San Bernardino County a joint bank account was maintained, on which checks were drawn by both parties.

The appellant testified that the money used in purchasing all these properties was brought by him from Wisconsin and was acquired by him prior to the marriage. Strange as it may seem, it appears from his testimony that while he was able to earn and save $30,000 in the two years before the marriage, and while he continued to conduct the same business for two years after the marriage, he was able to earn nothing during the six years of this marriage except a part of their living expenses, although his wife worked part of the time. He further testified that he did not at any time intend to give any portion of his separate property to the respondent; that when he acquired the properties in Long Beach he was told by some escrow company that it was necessary to take the titles in joint tenancy with his wife unless he paid all cash, but if he paid all cash he would not have to do so; that when he acquired the parcels in San Bernardino County he was still laboring under that assumption; and that when he bought those properties he was told the same thing by the Pioneer Title Company. However, when asked "What was your understanding when the property was placed in joint tenancy?" he replied: "Well, if my wife was living with me at the time of my death, she would get the property, but if she was not living with me I wanted full say of my own property."

Appellant's main contention is that there was no evidence to support the findings to the effect that some of these parcels were held in joint tenancy. In a somewhat similar situation the court said, in Cox v. Cox, 82 Cal.App.2d 867, 187 P.2d 23, 24:

> "The fact that the deed * * * was taken in joint tenancy established a prima facie case that the property was in fact held in joint tenancy. It raised an inference, even if the money used was separate property, that a gift was intended, there being no presumption of undue influence where the gift is from the husband to the wife. If it be conceded that the testimony of plaintiff tended to rebut the inference of a gift, whether it did in fact so rebut it was a question of fact for the trial court. Obviously, the trial court was not required to accept defendant's explanation. The deeds themselves created a conflict and support the finding."

In that case, the court further said: "It is a reasonable inference that plaintiff's desire to deprive defendant of her interest developed only after differences arose between them leading to the pending divorce." That observation is especially appropriate here in view of the appellant's qualifying statement in explaining what his understanding was at the time the property was placed in joint tenancy.

[1] From the time these parties came to California all property acquired, except

the home in Long Beach, was taken in joint tenancy; a joint bank account was maintained for some three years; and they filed joint income tax returns for 1948 and 1949, showing rentals from these properties as jointly received. The evidence, including the rather significant testimony of the appellant himself, with the reasonable inferences therefrom, is sufficient to support the finding that all property standing in the names of the parties as joint tenants is, in fact, joint tenancy property.

[2] It is further contended that the respondent waived the right to claim any interest in this property as a joint tenant by pleading that the property was community property. It is argued that the allegation that this was community property was denied by the answer; that the only issue before the court was whether or not this was community property; and that "no matter what the record title disclosed, the Court was bound to adjudicate the actual ownership of the property as entirely community or entirely separate." This contention is without merit. Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443. While the complaint alleged that this was community property, the prayer also asked for such other and further relief as might be proper. The answer and cross-complaint alleged that all of the property was the separate property of the appellant, and this was denied in an answer thereto filed by the respondent. The issues as to the nature of the property and the respective interests of the parties therein were sufficiently raised and the case was mainly tried on the issue as to whether or not these properties were, in fact, held in joint tenancy and what the actual intent of the parties was in that regard.

[3] The appellant makes the further contention that the findings are not sufficient to support the judgment since the court failed to "make findings of all material ultimate facts." As near as we can understand from the argument made it is contended that the court failed to find that the money with which these properties were purchased was owned by the appellant prior to this marriage; and that the court should have found that the appellant did not intend to make any gift of the property to the respondent. Findings were made as to all material issues and these findings sufficiently covered these incidental matters. By finding that the joint tenancies were in fact created, the court impliedly found against the contention that no gift had been intended, and whether or not all of the money going into these properties was previously owned by the appellant could not be a controlling factor. The argument that the testimony of the appellant necessarily destroyed any inference that might otherwise be drawn from the joint tenancy deeds; that this testimony was unambiguous and unimpeached; and that the court was bound to accept that testimony as true and to find that no joint tenancy was created or existed; is without merit under the circumstances shown by the record.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

114 Cal.App.2d 394

HOPKINS v. YELLOW CAB CO. et al.

Civ. 19082.

District Court of Appeal, Second District,
Division 2, California.
Nov. 26, 1952.

Action by school child, by her guardian ad litem, for injuries sustained while she was being transported to school in automobile of defendant taxicab company, pursuant to contract between said company and defendant school district for carriage of pupils. The Superior Court, Los Angeles County, Fred Miller, J., entered judgment on verdict in favor of the school child, and defendants appealed. The District Court of Appeal, Moore, P. J., held that cab company, which was otherwise common carrier, became private carrier while transporting pupils pursuant to the contract and owed to said pupils only duty of ordinary care, and, thus, instruction holding it to highest degree of care was erroneous.

Judgment reversed.

1. Carriers 🔑3

When a common carrier contracts to render a special service for a group of individuals or a public agency, it thereupon becomes a private carrier.

2. Carriers 🔑235, 280(1)

Taxicab company, which was common carrier while transporting public, became private carrier while transporting school children pursuant to contract with school district, and, thus, in absence from contract, and from statute authorizing contract, of provision establishing highest degree of care as standard to be observed by company in transporting the children, company owed only ordinary care. Education Code, § 16251.

3. Schools and School Districts 🔑159½

Statute providing that school district may contract and pay for transportation of pupils by common carrier authorizes district to supply pupils with fares to ride such conveyances as are available to general public as common carriers. Education Code, § 16251.

Joseph A. Ball, Long Beach, for appellants.

Russell H. Pray and William C. Price, Long Beach, for respondent.

MOORE, Presiding Justice.

Appeal from a judgment on a single question of law: Did defendants in transporting plaintiff and other school children in a taxicab, commonly used as a common carrier, owe plaintiff the duty of exercising the highest degree of care for her safety or merely ordinary care?

The Long Beach Unified School District had in attendance at its schools a number of physically and mentally handicapped children. It contracted with the Yellow Cab Company of Long Beach to furnish automobile and driver for the transportation of such children from their homes to school in the mornings, to their homes and return at noon, and back to their homes in the afternoon. The automobile under contract was licensed by the Public Utilities Commission of California as a taxicab. Its driver, defendant Sanders, entered upon his duties daily at 7:30 a. m. and left at 5:30 p. m. During such hours he was engaged in the public carriage of passengers as a common carrier under a franchise from the city. But while conveying the school children back and forth between 8 and 9 a. m. and 12 noon and 4 p. m. the automobile and driver were subject to the orders of the Unified School District pursuant to a written contract for the cab company to provide six yellow cabs for such service to the school district. By the contract, such cabs were supplied with drivers who were "required to assist children from their homes or school to the taxicabs and from the taxicabs to the inside of the school or to their homes * * * and to follow the shortest and safest route to or from the schools unless authorized otherwise"; also, during the periods of conveying such children no other passenger "shall be transported at the same time" a school child is in the conveyance. The cab company and its drivers were required to comply in all respects with the pertinent statutes and city ordinances and the latest regulations of the State Department of Education. The contract for the service of the taxicab and drivers was made pursuant to section 16251 of the Education Code.[1]

While Sanders was in such taxicab on his way with a number of children from the Clara Barton School to their respective homes, the door opened and respondent was precipitated from the cab to the street. Such fall caused Helen serious injuries for which the jury awarded her damages. The sufficiency of the evidence is not attacked. No error is assigned other than the *instruction* that the driver of the automobile in which Helen was riding "was required to use the utmost care and diligence for the safety of said passenger. * * * At the time of the accident * * * Yellow Cab Company * * * was a common carrier operating a taxicab * * * was required by law to use the utmost care and diligence for the safe carriage of plaintiff, to provide everything necessary for that purpose and to exercise a reasonable degree of skill. * * * The care required of it, however, was the highest that reasonably could have been exercised consistently with the mode of transportation used. * * * This requirement must be measured in the light of the best precautions that were in common practical use in the same business and proved to be most efficacious. * * * Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult. * * * One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children."

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[1] "The governing board of any school district may provide, with the written approval of the county superintendent of schools, for the transportation of pupils to and from school whenever in the judgment of the board such transportation is advisable and good reasons exist therefor. The governing board may purchase or rent and provide for the upkeep, care, and operation of vehicles, or may contract and pay for the transportation of pupils to and from school by common carrier, or may contract with and pay responsible private parties for the transportation."

Appellants complain that not only were such instructions given at the time of submitting the case to the jury, but that during the course of deliberations the same instructions were re-read to the jury when they re-entered the court room and asked for "the instructions *only* relating to whether or not the safety requirement as applied to this case was adequate."

Inasmuch as the parties stipulated that the responsibility of the District and the Cab company as principals was the same as that of the driver, the consideration of the criticized instruction will apply to all appellants alike.

While the school board might have believed that it could contract with the Cab company to exert the highest degree of care in transporting the children, respondent has supplied no authority to support her contention that the facts of this case deserve to be adjudged by a rule different from that which has been continuously set forth in the appellate decisions, to wit: a school district is liable for only ordinary care in the transportation of its pupils to and from its schools and their homes. Foster v. Einer, 69 Cal.App.2d 341, 347, 158 P.2d 978; Shannon v. Central-Gaither Union School District, 133 Cal.App. 124, 128, 23 P.2d 769, 770. The Shannon opinion declares that "a bus which is operated only for the convenience of a particular school under the circumstances of this case is a mere private carrier as distinguished from a common carrier, and that ordinary prudence for the safety of children under similar circumstances is all that is required of the district or the driver of the bus", citing Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396; Klein v. Baker, 112 Cal.App. 157, 296 P. 631, and 4 Cal.Jur. 815, sec. 2; Civil Code, section 2096; State ex rel. Public Utilities Com. v. Nelson, 65 Utah 457, 238 P. 237, 42 A.L.R. 849; note in 42 A.L.R. p. 855. The cited note declares that "one who operates a bus or stage in accordance with the terms of a contract, for the benefit of a particular class, and not for the benefit of the public generally, is not a common carrier." The Shannon decision holds also that since a "school bus is operated for the sole convenience of the pupils of a particular school, and there is no legal obligation for it to carry passengers generally or even to carry the pupils of other schools, it may not be deemed to be a common carrier of passengers, and the highest degree of care and diligence in its operation is therefore not required." The cited decisions are based upon facts which, of course, differ from those here involved but not sufficiently to justify instituting a different rule as to the degree of care. The Gornstein case is no better. It involves the right of a passenger who was riding on a chartered truck on its way to a Sunday picnic. The truck was not available to the general public on that Sunday and was therefore a private carrier.

[1] In conference it was suggested that because the taxicab was a common carrier on the streets and highways of the state it may have retained its character on entering the service of the school district. Such theory is encouraged by the language of section 16251, supra, which authorizes the school board to contract for transportation of pupils by common carrier. However, the current status of the law seems clearly to be that when a common carrier contracts to render a special service for a group of individuals or a public agency it thereupon becomes a private carrier. Such is the law as declared in a host of authorities from the United States Supreme Court and from many federal and state courts. In Bank of Kentucky v. Adams Express Company, 93 U.S. 174, 186, 23 L.Ed. 872, it was held that a contract may be made which will put a common carrier on the same level with a private carrier for hire. In Santa Fe, Prescott & Phoenix Railway Co. v. Grant Bros. Construction Co., 228 U.S. 177, 185, 33 S.Ct. 474, 477, 57 L.Ed. 787, it was held that whereas a common carrier cannot secure immunity from liability for its negligence by contract, such rule is not applicable when the common carrier is "acting outside the performance of its duty as a common carrier." In such event, it deals with "matters involving ordinary considerations of contractual relation", and is acting as "merely a private carrier in respect to the plaintiff [and] owed him merely the duty of ordinary care".

[2] In the situation at bar, the Yellow Cab Company's motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while transporting the specified children during such hours. See State of Utah ex rel. v. Nelson, 65 Utah 457, 238 P. 237, 42 A.L.R. 849; 42 A.L.R. 855.

While section 16251 is comprehensive, it makes no provision for establishing the highest degree of care as the standard to be observed by a common carrier when it engages to render such service as that promised by the Yellow Cab Company. Neither does the contract so provide. The standard must, therefore, continue to be ordinary care.

[3] The contention is made that if Yellow Cab Company be held to have been a private carrier while in the service of the school district, it will not be possible for any such district ever to effect the transportation of pupils by a common carrier as provided by the cited section. The answer to such argument is that the statute empowers the governing board to provide such transportation by supplying the pupils with fares to ride such conveyances as are available to the general public as common carriers.

The judgment is reversed.

McCOMB and FOX, JJ., concur.

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114 Cal.App.2d 354

In re GALVIN'S ESTATE.

GALVIN v. O'LEARY et al.

No. 15418.

District Court of Appeal, First District,
Division 1, California.
Nov. 25, 1952.

Executor filed his first and final account and petitioned for distribution, and beneficiaries of will of deceased testator filed objections. The Superior Court of the City and County of San Francisco, T. I. Fitzpatrick, J., entered an order sustaining the objection, and the executor appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that deed of realty by testator to executor individually had never been delivered and was ineffective.

Order affirmed.

1. Appeal and Error 🔑989

In determining whether trial court was justified under the evidence in making certain finding, District Court of Appeal had only to determine if there was any substantial evidence, or reasonable inferences therefrom, to support the finding.

2. Estoppel 🔑68(1)

Where executor presented will for probate, he thereby vouched that testator was of sound mind at time of execution of will.

3. Deeds 🔑194(3)

Presumption created by statute providing that a grant duly executed is presumed to have been delivered at its date pertains only to the date and not to the fact of delivery. Civ.Code, § 1055.

4. Evidence 🔑589

On accounting by executor and on petition for distribution, trial court was not bound to accept as true the testimony of the executor, who was an interested party, even though such testimony was not directly contradicted, particularly where many circumstances constituted a contradiction.

5. Witnesses 🔑364

On accounting by executor and on petition for distribution, court, in passing on credibility of executor, was authorized to consider his interest in result of the case.

6. Deeds 🔑208(1)

On accounting by executor and on petition for distribution, evidence sustained finding that deed of realty by testator to executor individually had never been delivered and was ineffective. Civ.Code, § 1055.

7. Deeds 🔑194(3)

Presumption under statute providing that a grant duly executed is presumed to have been delivered at its date is a rebuttable presumption and may be contradicted by circmstantial evidence which is clear and convincing. Civ.Code, § 1055.

8. Appeal and Error 🔑345(1)

Where notice of appeal was filed within statutory period after denial of motion for new trial, appeal was timely, though filed more than 60 days after entry of order appealed from. Probate Code, § 1231.

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Mancuso, Herron & Winn, San Francisco, for appellant.

John B. Ehlen, San Francisco, for respondent.

BRAY, Justice.

Appeal by John F. Galvin individually and as executor from a portion of an order of the probate court, sustaining an objection to the executor's first and final account and petition for distribution. The effect of the portion of the order appealed from is to require the executor to inventory and account for certain real property claimed by appellant individually and which the court found belongs to the estate.

Questions Presented.

1. Is there substantial evidence to support the court's finding of nondelivery of the deed, in view of appellant's testimony and the presumption arising from his possession of it? 2. Is the appeal timely?

Record.

The will of decedent of which appellant is executor left a legacy of $7,000 to a niece, Peggy O'Leary, one of $4,000 to a niece, Nora O'Leary, and one of $4,000 to his sister, Mrs. Annie O'Leary. The residue of his estate the testator left to his nephew, appellant. The three legatees, who live in Ireland, filed objections to the account, because of appellant's failure to inventory and include in the account the real property which had been decedent's home, and the moneys in two banks which prior to the death of decedent were in joint accounts with appellant. At the hearing objection to the noninclusion of the moneys was withdrawn. Appellant produced a deed of gift to him of the home property. Issue was joined as to its delivery. The court found (1) that the deed was never delivered with intention to be presently operative or to presently vest title in the grantee, and (2) that at no time was it physically delivered to the grantee.

Evidence.

Over a year prior to a contemplated trip to the old country, decedent, an 80 year old Irishman, transferred in the presence of appellant, into joint accounts with appellant, two of his bank accounts, which at the time of his death had balances of $10,532.70 and $14,950.77 respectively. Approximately 15 days later the deed in question was executed. Appellant testified that his uncle told him that he wanted to turn everything over to the nephew for "the purpose of avoiding probate expenses * * * or to have any legal entanglements of any kind at all"; also that decedent did not want appellant to work any more as the latter had had a heart attack. On April 15, 1948, decedent and appellant went to see Doherty, a realtor and notary public and an old friend of decedent. Appellant did not recall the conversation in the presence of the notary other than that decedent instructed the latter to draw the deed. Appellant did not remember whether the deed was drawn at that time. Later that day, according to appellant, decedent and he returned to Doherty's office. Appellant is not sure whether the deed had been signed before that or was then signed. The notary handed the deed to decedent in appellant's presence. Then "somewhere between going out the door and outside of the door" and not in Doherty's presence decedent handed appellant the deed. Thereafter, appellant claims, he kept the deed in one of his own safe deposit boxes (he does not remember which) "and at home," and that it was never placed in the joint tenancy safe deposit box maintained by decedent and appellant where the joint tenancy bank books were kept. A little over a year after executing the deed decedent went to Ireland for a trip, remaining there until his death. A Mrs. Dearborn, a tenant and evidently the manager of the property, testified that after these transfers were made, decedent told her that his relatives had tried to buy the property from him, that many of them wanted the property, that since he wanted friendly relations with his family, he asked her not to reveal to them that he had given all of his estate to appellant by deed of gift.

A week or two before the uncle's death appellant learned that he had had a heart attack. He died Sunday, August 28, 1949. On the preceding Friday appellant went by auto to La Honda with Dr. and Mrs. Commins and their niece, taking the deed with him. Dr. Commins did not see the deed but testified that on the trip appellant made some reference to having it with him. A telegram to appellant notifying appellant of the death was received by appellant's mother early on Monday morning. That morning appellant and the Commins returned to San Francisco, going immediately to the bank where the joint safe deposit box of decedent and appellant was. There, appellant claims he withdrew only the two joint deposit bank books. He immediately went to the two banks and had these deposits transferred to his own name. Then he recorded the deed. On returning home he was given the telegram and learned for the first time of his uncle's death. He testified that the reason that he did not record the deed before was that he understood that as it was notaried he thought that was all that was necessary. "Maybe a week or two" prior, his attorney suggested that he have the deed recorded. Dr. Commins testified that before decedent went to Ireland, the latter stated to the doctor's wife with reference to some plants in the garden, that appellant "can give them to you—it is his place." Decedent also asked the doctor to influence appellant to quit work "because he has plenty of money now," intimating that he, decedent, had given him the money.

At one place in her testimony Mrs. Dearborn stated that decedent had told her he had given the property to appellant "because he knew he would take good care of it *for him*." (Emphasis added.) When this answer was read to her, she denied she said it and then retracted the statement. More important, however, is the following discrediting of a portion of her testimony. She testified that shortly before decedent left for Ireland, in his own handwriting he wrote the name, address, etc., of the nephew so that, if necessary, she could get in touch with the latter. This writing is in evidence together with exemplars of decedent's admitted handwriting and signature. While the court made no direct finding on the subject, it does not take a handwriting expert to determine that the handwriting could not possibly have been that of decedent.

Sufficiency of Evidence.

[1] Appellant contends that there is not sufficient evidence to overcome his testimony and the presumption of delivery arising from his possession of the deed. In determining the sufficiency of the court's finding on the subject we have only to determine if there is any substantial evidence, or reasonable inferences therefrom to support it. We find ample evidence to do so. At the outset, appellant's version of the circumstances under which he claims to have received the deed are refuted by Doherty. The latter testified that the decedent and appellant were together when decedent instructed him to draw the deed, saying that he wanted the property to go to his nephew "in case anything happened to him." Decedent alone returned to secure the deed. Decedent then signed the deed. Doherty acknowledged it, placed it in an envelope and handed it to decedent, who left with it. Doherty's recollection is clear that appellant was not there. If Doherty's testimony is true (and the trial court evidently believed it) decedent did not give appellant the deed, as the latter claims he did. Coupling appellant's false testimony in this regard with the other circumstances hereafter related and the fact that appellant had access to the joint safe deposit box where it is most likely decedent would have kept the deed, a strong inference arises that appellant did not come into possession of it until the Monday morning after the uncle's death when, prior to recording the deed, appellant admittedly went to that box.

The property consisted of two flats and a basement apartment. The flats were rented out and decedent lived in the basement. After executing the deed decedent continued to live in the premises, and to collect the rents. These he kept in a bank account of his own, in which he also deposited his pension. While away, Mrs. Dearborn managed the property for him, depositing the rentals for him in this bank account and accounting to decedent by mail. Neither decedent nor Mrs. Dearborn ever accounted to appellant. In January, 1949, Doherty wrote a policy of fire insurance on the property, loss payable to decedent as the insured. Appellant did not file a gift tax return during the year he claims he received the deed. He testified he did not know he was required to. While the uncle was in Ireland, appellant wrote him saying, "I just talked to Joe Kearney at *your house* and he said to tell you everything is going fine." (Emphasis added.)

On the question of whether by the deed decedent intended to divest himself of title, see Fisher v. Oliver, 174 Cal. 781, 788, 164 P. 800, and McCarthy v. McCarthy, 82 Cal. App.2d 166, 185 P.2d 821, two letters written by decedent and his will are significant. A letter written about August 3, 1948, three and a half months after the execution of the deed, stated: "We [i. e., his wife and he] Had Some Good Property 3 Nice Peices All in San Francisco. I Have Sold two Places and Kept this where I am Now Living its a nice Home and Has a Good Income." One written September 29, 1948, stated: "Yes I am Glad I Sold My two Places. I Got a Good Price and I Let Them Go. I Only Got this House where I Now Live and I thing I will Keep this One its Hard to Find a Place to Live Houses are very Scarce and very Expensive to Buy So I will Leave well Enough alone and Keep what I Got though I Could Get a Big Price But would Have no Place to Go to this is the First Place We Ever Had and I dont want to Sell it."

[2] Twenty days before his death, August 8, 1949, decedent executed his will bequeathing respondents a total sum of $15,000. At that time, exclusive of the real property in question, decedent's entire estate consisted of $2,199.22. Appellant presented this will for probate and is now its executor. He thereby vouches for decedent being of sound mind at the time of its execution. It is difficult to reconcile decedent's action in making bequests totaling $15,000 (which could only be obtained from a sale of the real property) on any other basis than that he had intended that the deed, as he told Doherty, was, in effect, to be testamentary in character.

Presumption.

[3] Section 1055, Civil Code, cited by appellant, provides "A grant duly executed is presumed to have been delivered at its date." The presumption created by this section pertains only to the date, not to the fact of delivery. Miller v. Jansen, 21 Cal.2d 473, 132 P.2d 801. There is some confusion in the authorities as to whether, apart from the effect of this section, possession of a deed raises a presumption or an inference. Central Trust Co. v. Stoddard, 4 Cal.App. 647, 88 P. 806, refers to it as a presumption which can be overcome only by clear and convincing evidence. Thompson v. McKenna, 22 Cal.App. 129, 133 P. 512, holds that possession of a deed constitutes prima facie evidence of delivery. (Appellant relies on this case greatly because of its additional holding that the testimony of persons present at the execution of the deed that they did not see it delivered was insufficient to overcome the fact established by its possession. Such holding is not in point here. There is a great and obvious difference between testimony as to not seeing something which might have happened between persons present on a particular occasion, and testimony that one of the principal actors in the alleged drama was not present at all, which, if true, would necessarily have meant there could have been no performance.) There are many other cases holding in favor of a presumption, among them Stewart v. Silva, 192 Cal. 405, 221 P. 191, and California Trust Co. v. Hughes, 111 Cal.App.2d 717, 245 P.2d 374. In Ephraim v. Oakland Title, etc., Co., 54 Cal.App. 379, 201 P. 946, the court states: "The possession of the deed by the plaintiff was some evidence of its delivery, and was sufficient *in the absence of any contradictory evidence* to establish it." 54 Cal.App. at page 383, 201 P. at page 948. (Emphasis added.) Hill v. Donnelly, 43 Cal.App.2d 47, 110 P.2d 135, holds the acknowledgment and recording of a deed as well as possession of it raises a presumption of delivery. Miller v. Jansen, supra, 21 Cal.2d 473, 132 P.2d 801, refers to possession raising an "inference" of delivery, citing as support therefor thirteen cases, including Drummond v. Drummond, 39 Cal.App.2d 418, 103 P.2d 217, infra. In Hennelly v. Bank of America, 102 Cal.App.2d 754, 228 P.2d 79, the court pointed out that the defendant contended that possession of the deed raised a *presumption* of delivery while the plaintiff claimed it merely raised an *inference*. Both parties cited Miller v. Jansen, supra, 21 Cal.2d 473, 132 P.2d 801, as support for their positions. The court stated that in that case "The Supreme Court there held that a duly signed and *delivered* instrument is presumed to have been *delivered at its date*, not that it was presumed to have been *delivered*." 102 Cal.App. at page 758, 228 P.2d at page 81. Without expressly determining in so many words the question of whether the result of possession is a presumption or an inference, the court held, 102 Cal.App. at page 758, 228 P.2d at page 81: "Under these circumstances possession by the grantee gives rise to an *inference* that the instrument was duly delivered. Miller v. Jansen, supra, 21 Cal.2d at page 477, 132 P.2d 801 and cases cited." As Miller v. Jansen had held that possession only raised an inference as to delivery although a presumption *as to date*, it would appear that the court had finally settled the confusion by deciding that possession raises an inference rather than a presumption. As to this confusion between *presumption* and *inference* the language of Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533, is applicable here. There the court was considering instructions on res ipsa loquitur which stated that the doctrine raised a *presumption* instead of an *inference*. The court said, 11 Cal.2d at page 734, 81 P.2d at page 955: "While it appears to be well settled that under the rule of *res ipsa loquitur* an inference and not a presumption arises on proof by plaintiff of the necessary facts [citations], these terms are often erroneously used interchangeably, and as conveying the same meaning. We find that many lawyers and courts as well make this same mistake. We question whether the ordinary layman, to say nothing of many members of our profession, clearly comprehends the difference in the meaning of these two expressions.

While courts have frequently called attention to the erroneous use of the terms, 'presume' and 'presumption' in stating the rule of *res ipsa loquitur,* no decision has been called to our attention in which a judgment has been reversed by reason of the erroneous use of these words." Whether possession raises an inference or a presumption is not too material in our case for the reason that the contradiction of appellant's testimony as to how he possessed the deed and the other circumstances of the case constitute the strong and convincing evidence which it is said is necessary to overcome a presumption.

Stewart v. Silva, supra, 192 Cal. 405, 221 P. 191, strongly relied on by appellant, in which the Supreme Court reversed the finding of nondelivery by the trial court, is not in point here. There the attorney who prepared the deed, his secretary and the grantee all testified to the deed's delivery. Six witnesses testified that the grantor told them that he had deeded the property to the grantee. The deed at all times since execution was in the possession of the grantee. The main evidence to overcome this showing was that the insurance policy on the house was retained in the grantor's name and he paid the taxes. The court held that possession of the deed constituted *prima facie* evidence of delivery and that the "evidence of the continued dealing with the property by the grantor was not necessarily in conflict with the actual situation disclosed by the evidence as offered by the defendant." 192 Cal. at page 410, 221 P. at page 193. The court recognized, however, the fact that this dealing with the property by the grantor did raise an inference of nondelivery but held "* * * the inferences arising therefrom of nondelivery would not be sufficient under the circumstances to overcome the *prima facie* case arising from the possession of the deed by the grantee. * * * If the trial court disbelieved all the witnesses who testified on behalf of the defendant with reference to the delivery of the deed, there is no evidence to overcome the presumption of delivery derived from the fact that the grantee had possession of the deed. If the trial court believed the testimony of these witnesses, it could not escape a finding of fact that the deed was delivered." 192 Cal. at pages 410, 411, 221 P. at page 193. We have no such situation in our case.

Appellant cites cases similar to Drummond v. Drummond, supra, 39 Cal.App.2d 418, 103 P.2d 217, for the proposition that manual delivery of a deed to the grantee is not essential to the passing of title. Just how this helps defendant does not appear in view of his testimony that there was a manual delivery, which testimony the trial court did not believe. Again, cases like the Drummond case and Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507, holding that subsequent collection of rental, and other acts of control by the grantor, do not vitiate the title of a grantee where there has been a delivery, are not in point. Here those acts were not shown for the purpose of vitiating the deed. They were circumstances which if standing alone might not evidence nondelivery, but which added to all the other circumstances in the case strongly show that there was no delivery.

[4–6] Appellant's main contention is that his testimony as to the delivery of the deed is uncontradicted and because of that fact and the presumption which follows from his possession of the deed, the trial court is precluded from considering the other circumstances of the case and finding adversely to him. First, the premise is unsound, because his testimony as to delivery is directly contradicted by that of the notary. How could the grantor have delivered appellant the deed if as the notary testified appellant was not present at the time and place where appellant claims he received the deed? Secondly, the trial court is not bound to accept an interested party's testimony as true, even though it were not directly contradicted, particularly where, as here, the many circumstances constitute a contradiction. In Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657, 660, the court said: "Moreover, a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, * * *." In passing on appellant's credibility, the court was authorized to consider his interest in the result of the case. Hennelly v. Bank of America, supra, 102 Cal. App.2d 754, 759, 228 P.2d 79. Whether there was a delivery "involved a disputed question of fact which it was the function of the trial judge to determine from the facts and circumstances in evidence. It was for him to pass upon the credibility of the witnesses, to weigh their testimony, and draw therefrom his inferences. [Citations.] In all such cases, evidence as to the delivery of a deed, not recorded until after the chief actor's death, must necessarily be closely scrutinized; and the law demands that such a deed shall have in its support evidence clear, unequivocal, and convincing, such as satisfies the court of actual intent to pass immediate title. It is manifest from the written decision of the trial court that the judge did not find the evidence in behalf of the defendant to be of a convincing character, and concluded that the preponderance of the evidence was in favor of plaintiffs. *Though Mrs. Matthieson was not directly impeached, yet the judge was not bound to give implicit faith to her testimony.* He was justified in testing its verity by the conduct of the parties, the distinctive characteristics of the transaction, and all the attendant circumstances. [Citations.]" Morgan v. Mattheson, 103 Cal.App. 510, 517, 285 P. 325, 328. (Emphasis added.)

[7] Finally, the presumption is a rebuttable one and may be (and here was) contradicted by circumstantial evidence which was clear and convincing.

Timeliness of Appeal.

[8] Respondents contend that the notice of appeal, being filed more than 60 days after entry of the order appealed from, is too late. However, appellant properly moved for a new trial. See Prob.Code, § 1231; Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231. The notice of appeal was filed within the statutory period after the denial of the motion for new trial. Hence the appeal is timely.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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114 Cal.App.2d 399

PEOPLE v. WAXMAN.

Cr. 4818.

District Court of Appeal, Second District,
Division 2, California.
Nov. 26, 1952.

Hearing Denied Dec. 22, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Walter R. Evans, J., of grand theft, and he appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law 🔑260(11)

Judgment in a criminal case is final as to sufficiency of evidence, unless it can be held that sufficient facts could not have been found by trial court to warrant its implied findings, and before they can be set aside, it must be made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

2. False Pretenses 🔑49(1)

Evidence sustained conviction for grand theft by obtaining money from newspaper publishers for nonexistent paper. Pen.Code, §§ 484 to 490a.

3. Criminal Law 🔑419(11)

In grand theft prosecution of defendant charged with obtaining money from newspaper publishers for purchase of nonexistent paper, wherein all evidence indicated that defendant's employee, who dealt with the publishers, was the innocent dupe of defendant's scheme and defendant's tool in effectuating defendant's criminal device, court properly permitted defendant's employee and publishers to testify as to conversations between defendant's employee and publishers while defendant was not present, over objection that conversations were hearsay, since conversations were not hearsay. Pen.Code, §§ 484 to 490a, 2295.

4. Criminal Law 🔑1130(2)

Where appellant failed to set forth in his brief the events that occurred at times of alleged rulings on his objection to admission of certain testimony, and he did not even specify pages in transcript where they might be found, his claim that trial court erred in overruling his objections to admission of the testimony was not required to be considered on appeal.

5. Criminal Law ⚷62

Where a person has caused a crime to be committed through the instrumentality of an innocent agent, such person is the principal even though he did not appear at scene of the crime.

6. Criminal Law ⚷1134(1)

The District Court of Appeal has no duty on appeal to explore record and search digests to determine an issue.

7. Criminal Law ⚷386

In grand theft prosecution of defendant charged with obtaining money from newspaper publishers for purchase of nonexistent paper, court properly excluded as hearsay a telephonic conversation between witness, who was telephone solicitor for a newspaper publisher, and person who announced himself as a certain alleged individual, from whom defendant, according to defendant's testimony, was to obtain the nonexisent paper.

8. Criminal Law ⚷1134(6)

Where court has excluded testimony on a specific objection to the testimony, aggrieved party cannot on appeal urge for the first time that the offer of the testimony was made for a different purpose.

9. False Pretenses ⚷52

In grand theft prosecution of defendant charged with obtaining money from newspaper publishers for purchase of nonexisting paper, court did not err in refusing to give instruction that it was necessary that jurors all agree as to whether defendant was guilty of embezzlement, obtaining property by false pretenses, or larceny by trick and device, and that if jury should not be able to agree, unanimity of decision necessary to warrant verdict of guilty would be lacking, and it would be improper for jury to deliver such a verdict, since jury was required only to determine as to each count whether crime of grand theft had been committed. Pen.Code, §§ 484 to 490a.

10. Criminal Law ⚷829(1)

Omission of third paragraph of defendant's requested instruction was proper, where such paragraph was virtually a repetition of legal principles enunciated in preceding paragraphs.

11. Criminal Law ⚷678(1)

In grand theft prosecution of defendant charged with obtaining money from newspaper publishers for purchase of nonexisting paper, court properly denied defendant's motion requiring district attorney to elect to proceed on theory of embezzlement, theory of larceny by trick and device, or theory of obtaining money by false pretenses, since technical distinctions between such types of larceny have been abolished and consolidated under one heading by statute. Pen.Code, §§ 484 to 490a.

◆

Jerome Weber, Los Angeles, Jess Whitehill and Harold I. Chernese, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Asst. Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Dep. Dist. Atty., Los Angeles, for respondent.

MOORE, Presiding Justice.

Having been convicted on seven counts[1] of grand theft, appellant now demands a reversal on the grounds of insufficiency of the evidence errors in rulings on the admissibility of evidence and errors in rejecting offered instructions.

In the spring of 1951 there was a scarcity of newsprint on the Pacific coast. Its price had soared to $250 a ton. Appellant was publisher of certain neighborhood newspapers in Los Angeles. He thereby knew the needs of his fellow publishers and determined by reason thereof to enhance his prosperity. To that end he conceived the following device: He would pretend to have been accorded a special privilege by an official of the Powell River Sales Company of purchasing 1000 tons of newsprint at $110 a ton; he would add to the initial cost $50 for the company's disloyal official, $40 for himself, $25 for a salesman's services and $9 a ton for transportation charges. Pursuant to the urgings of such fantastic chimera, appellant enlisted the witness S. C. Montrose to sell 200 tons of the paper at $234 per ton and explained to him that the official of the Powell River Paper Company had come down to see him and had authorized him to sell the 1000 tons of "this very fine paper" but to suppress the official's name. Appellant promised that such request would be honored and the name kept a secret.

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[1] The seven thefts of which appellant was accused are as follows: $2,925 was taken from the Van Nuys Publishing Company; $2,925 from the same publisher; $11,700 from the Herald Publishing Company; $23,400 from the Citizens-News Company; $5,850 from the same publisher; $5,850 from the Rodgers-McDonald Publishing Company; $2,925 from the Progress Bulletin Publishing Company. The dates of the thefts were between May 23 and June 15, 1951.

For the purpose of materializing the Waxman dream, appellant directed that Montrose should receive $25 a ton, payable out of the sums collected on receipt of the newsprint at appellant's warehouse; he should collect half of the amount of each order and obtain the buyer's written agreement to pay the balance on delivery, and such writing should provide for the return of moneys in the event the merchandise should not be received within the time designated in the agreement. Waxman prepared one document entitled "Instructions to Montrose" whereby the latter was directed to collect one half the contract price and to obtain from the publisher on the latter's own stationery an order for Waxman to purchase the tonnage desired. A second document was the form of purchase contract between Waxman and the publisher. Its terms substantially were; acknowledgment of receipt by Waxman for one half the amount of the order, a promise to return it should Waxman be unable to make delivery by July 7, 1951. It was entitled "Newsprint Purchase Agreement." A third writing was a form letter authorizing Waxman to purchase the amount of paper specified.

At the time of Montrose' agreement to engage in the effort to sell the newsprint, he inquired of Waxman why the sales could not be made by using the letter of credit or the escrow method for effecting sales. Appellant explained that such would not be possible; that by reason of the secret personality interested in the matter, the transactions would have to be effected by the use of cash.

Armed with a set of the documents prepared by appellant, Montrose called successively upon the publishers named in the indictment, procured their execution of the agreements and letters of authorization to buy and received from each a check for one half of the purchase order. After Montrose had sold 200 tons, appellant gave him permission to repeat his performance. After new orders for such tonnage had been received, appellant authorized his agent to sell another 200 tons. However, his total sales aggregated only 475 tons which brought to the Waxman treasury $55,575.

When July 6 arrived, appellant had Montrose advise the investing publishers there would be a delay in the arrival of the cargo until July 12 by reason of the shipping strike and to ascertain whether anyone would not wait but would prefer to have his money refunded. All but the Citizen-News agreed to the delay, whereupon after conference with Waxman, Montrose advised the Citizen-News to make a written request for the return of its money. After that event Waxman vanished to commune with the denizens of shadowland. His return to the walks of men was celebrated by his sudden appearance at the office of the District Attorney of San Francisco on July 13, 1951. He introduced himself to Deputy Acton saying that he desired a warrant against "Charles Morrison"; that "Morrison" had called at his office and introduced himself as manager of the Powell River Paper Company; that they discussed the current newsprint shortage; that the present price was $110 a ton when available; that he had been with his company 30 years and his position there was the most important thing; that money on a side venture was secondary, but he could divert 1000 tons to Waxman's nominee for $160 a ton net, appellant to have all he received above that price. Appellant reported that he told Acton that he immediately sold the Pasadena Independent 100 tons at $200 a ton, one half payable at time of the order, to be delivered June 7 but when it had not arrived on June 21 he returned the deposit at Morrison's suggestion. Waxman told Acton that Morrison said he could get 1000 tons for appellant to sell on the same terms; that he thereafter sold 475 tons and received therefor $55,575; had come to San Francisco to meet Morrison in order to pay him $50,000 in $100 bills; had met Morrison and delivered the $50,000 when Morrison told him the newsprint would arrive in San Francisco Harbor on Thursday, July 12; they would meet again on Thursday when the cargo of newsprint would be placed at the disposal of Waxman who should forward it to his vendees; but Morrison did not appear; appellant made telephonic contact with the San Francisco office of the Powell River Company, learned that the manager's name was Jeffries, and when he asked for Morrison was chagrined to hear Jeffries say he had been with the company 15 years but had never heard of Morrison. In the course of the conference, Acton told Waxman: "For a man who has just been robbed of $50,000, you are the coolest man that has even come into this office."

Following his return to Los Angeles, Waxman repeated to Montrose the story he had poured out to Acton, exhibited a copy of the complaint supplied by the deputy; told how he had taken the $50,000 to Morrison, how the latter had given him nothing and disappeared, how he had tried to locate him through the Powell River office at San Francisco and then visited the district attorney's office and filed a complaint, but could not give that officer any information as to Morrison's residence, friends or holdouts. After sharp words had passed, appellant stated that if he could not raise the money, he was "in a tight spot." He then had Montrose call at the Citizen-News to relate it to President Palmer. The latter was the first of the publishers to hear that appellant had departed with $50,000 in currency for San Francisco on July 9 to meet the man who had arranged to make available the newsprint; and that his name was Morrison. Montrose repeated appellant's story of how Waxman had delivered the money to Morrison at the St. Francis hotel with the understanding that the two should meet on the pier two days later when transfer of the paper cargo to Waxman should be made, but that was the last seen or heard of Morrison or the $50,000 package of currency. But while at the northern city, appellant telegraphed all his victims to meet him at the Biltmore Hotel in Los Angeles on July 18. He there repeated all his asserted experiences with "Morrison" commencing with the latter's first call on appellant with the proposal to arrange for Waxman to have newsprint on condition that he receive for himself $50 a ton and that his name be kept secret. He repeated the account of his efforts to discover Morrison and his having signed a complaint before the deputy district attorney at San Francisco.

Thereafter, events occurred more rapidly for appellant than his own efforts to obtain newsprint had moved. In less than three weeks the grand jury presented the indictment accusing him of grand theft on seven separate occasions. In his statement to the district attorney he disclosed that he had received the checks of the publishers and deposited them to his personal account, withdrew the funds in currency, wrapped it in a newspaper and delivered it to Morrison in San Francisco.

No part of appellant's fairy tale was corroborated except his withdrawal of the "purchase money" from the bank and his visit to the northern city. His recital of a stranger's first visit to Los Angeles, the latter's agreement to allocate 1000 tons of newsprint to Waxman at $160 a ton while its current price was $250, on the corrupt condition that $50 per ton be paid to the stranger personally as his profit—such a story is too superficial to seduce the belief of any reasonable mind that dwells in the world of the practical and common place. He learned nothing about the life of his phantom benefactor; requested no inspection of his credentials as an officer of the Powell River concern, made no inquiry into his background, or his knowledge of the newsprint industry, asked for no character references, exacted nothing in writing to evidence his agreement with one who had suddenly arisen from nowhere gratuitously to provide appellant an opportunity for good fortune. But more incredible still is appellant's illy-conceived route for effecting a final transfer of the imaginary cargo from "Morrison" to himself. That a buyer of any kind of merchandise would deliver $50,000 into the hands of the vendor, take no receipt, call in no witness or demand no guaranties is such a performance as might have occurred when Rollo sailed the high seas and rarely fulfilled a promise to the victim of his piracy. But it does not occur in the modern world. Not only is the bleak narrative of appellant's negotiations with this chimerical person too absurd to attract the most brilliant talent for credulity but in the only two instances when he sought to fortify his narrative by appropriating a substantial fact, he failed. In order to establish that he was the victim of a swindle, he told Mr. Acton that he had telephoned the office of the Powell River company and *"asked for Morrison."* However, when Barbara Maywald appeared as a witness, she testified that only two persons were in the Powell River office, to wit, herself and Donald Jeffries; that when a voice called in on July 12, 1951, and said it was Waxman speaking, she told him the manager was not in. Waxman asked her his name; that when she answered "Jeffries," Waxman said no more—*did not mention the name Morrison.*

Judgment Final

[1, 2] The judgment in a criminal action is final as to the sufficiency of the evidence unless *"'it can be held that sufficient facts could not have been found'"* by the trial court to warrant its implied findings, and before they "can be set aside * * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Jones, 36 Cal.2d 373, 375, 224 P.2d 353, 354; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. That there is a sound hypothesis in the law and also abundant material evidence contained in the record of this action to support the judgment cannot be doubted.

In order to simplify criminal procedure, the legislature in 1927 consolidated the statutes on larceny, false pretenses and embezzlement in one, under the heading of "theft." Penal Code, sec. 484; see also secs. 485 to 490a. While appellant recognizes that grand theft may be committed by proving that the accused obtained the money of his victims by any one of the three crimes, he has at great pains attempted to show that the evidence is not sufficient to justify a finding of guilt under any one of the three hypotheses embraced within section 484. He contends impliedly, if not actually, that each transaction was a *sale* of tons of newsprint; that he was neither bailee nor agent of the purchaser; that the money did not belong to the publishers; that it was not in his posssession when embezzled; that he did not appropriate the money; that he is not shown to have intended to deprive his victims of their money.

Such contentions are contrary to the evidence. The proof is that appellant authorized Montrose to sell the paper on a commission basis. Pursuant to their agreement, the buyers paid one half at the time of the purchase and appellant promised to refund the money if the merchandise should not be delivered. He took the checks of the purchasers, deposited them to his personal account; withdrew $50,000 in one lot of $100 bills and transported it to a depositary unknown to all the world but Waxman. Nothing in the entire proof indicates that it was ever intended that appellant should use the money for his personal benefit. It was to be used solely for the purpose of purchasing newsprint. Taking his own words: he transposed $50,000 of the money received from the publishers to a man he calls "Morrison"; took no receipt; kept no proof of Morrison's habitat or friends. The story told of his dealings with Morrison is so visionary as to justify the finding that it was false. Because the constituent elements of his narrative seemed to arise from airy nothingness, because it was not substantiated in the slightest degree by any witness and because the statements he made to induce the publishers to invest are, in themselves, so contrary to the common behavior of men, the verdicts were justified. If, at the time the money came into his possession, appellant intended to steal it, his act can constitute nothing more than a trick and device. People v. Jones, 36 Cal.2d 373, 224 P.2d 353. Under the implied finding, he intended to steal the money when it came into his hands. But if he did not intend to appropriate it then, he did so when he took it from his bank account and secreted it in places unknown to all others, and if he did not intend to steal the money at first, he did intend to do so later when he says he disposed of it and it was no longer available to him for the purpose of buying newsprint or of returning it to those who trusted him. People v. Mason 86 Cal.App.2d 445, 452, 195 P.2d 60, false pretense; People v. Schroeder, 43 Cal.App. 623, 625, 185 P. 507, embezzlement.

Appellant says there is no evidence of any misrepresentations of material facts and for that reason he cannot be guilty of theft by false pretenses. On the contrary, he and his representative told each publisher that he had arranged for the purchase of newsprint from a Canadian concern; it must be sold for cash in order to protect the official of the factory and they promised and inserted in every contract made by appellant a covenant to return the money if delivery of the paper could not be made. Upon that promise alone the jury would have been warranted in finding that at the time the publishers made the payments on the so-called contracts of purchase, they did so while relying upon the promise which appellant had no intention of performing. He would in that event have been guilty of theft by false pretenses. But he did more. He represented that an official of a newsprint factory had conferred a special favor by allocating to him 1000 tons of his product for sale at a reasonable price. His pretended enterprise, all words, deceived his friends and his deceit was actionable.

No Error In Rulings

[3, 4] Appellant contends that he was prejudiced by the court's overruling his objection to the testimony of Montrose whereby the witness was allowed to repeat his conversations with the several publishers who made the agreements to purchase the newsprint. Such conversations were not hearsay. It is contended that the witness had not been appellant's agent in making the sales but was an independent contractor over whom appellant had no control. Such contention is against law. Not only did appellant fail to set forth in his brief the events that occurred at the times of the alleged rulings but he did not even specify the pages in the transcript where they might be found. His claim is therefore without basis and should not be considered. People v. Jenkins, 118 Cal.App. 115, 120, 4 P.2d 799. However, it may be pertinent to observe that such contention ignores the proof that appellant prepared all the documents used by Montrose and that the latter followed the program of appellant even to the statements to be made to the purchasers. He had no discretion in preparing the contracts of sale, could not use a letter of credit, sell for cash on delivery or have the money escrowed. He was instructed as to what he should say with reference to the source of the product offered to the publishers. When Montrose deviated from the established wording of the contract with Rodgers-McDonald Publishing Company, he promptly obtained Waxman's written "O.K." He followed Waxman's instructions as to his negotiations with the publishers when informed that no newsprint would be available on July 7. All the evidence indicates that Montrose was the innocent dupe of Waxman's perfidious scheme and was his pliable tool in effectuating the latter's concealed criminal device. See Civ.Code, sec. 2295.

[5] Where a person has caused a crime to be committed through the instrumentality of an innocent agent, such person is the principal even though he did not appear at the scene of the crime. People v. Keller, 79 Cal.App. 612, 617, 250 P. 585. However, the respondent was not compelled to rely solely upon the testimony of Montrose as to his agency. In his statements to the district attorney, to the publishers at the Biltmore and in his own testimony, appel-

lant admitted that he had authorized Montrose to sell newsprint and had signed the "Instructions to S. C. Montrose." Either Montrose or Waxman corroborated the publishers. It was both proper and correct for the jury to find that the representations of Montrose as to the availability of newsprint, its price and date of delivery were not only authorized but were subsequently approved by Waxman. People v. Jones, 61 Cal.App.2d 608, 627, 143 P.2d 726.

[6] The contention that the court erred to appellant's prejudice in permitting the publishers to testify as to their several conversations with Montrose is fully answered in the foregoing discussion of the court's ruling that Montrose's testimony was not hearsay. In no instance does appellant show the error of which he complains in general terms. It is not the duty of this court to explore the record and search the digests to determine an issue. People v. Jenkins, supra. The litigant should play a stellar role.

Testimony of Fay Wood Properly Excluded.

[7, 8] Miss Wood testified that she was in February, 1951, telephone solicitor for the Northwest Leader, a neighborhood newspaper in Los Angeles; that at that time she had a telephonic conversation with a person who announced himself as Charles Morrison; that her publication was not controlled by Waxman. The conversation was properly excluded as hearsay. Neither was it admissible *to show efforts to produce the phantom "Morrison."* However, on appeal it is contended that the conversation was admissible to prove the fact of the conversation. Such argument is too late. When the court has excluded testimony upon a specific objection to testimony, it is not orthodox for the party on appeal to urge that the offer was made for a different purpose. People v. Brown, 43 Cal.App.2d 430, 433, 110 P.2d 1059. Because Waxman testified fully as to his meetings with Morrison; because Montrose and four publishers testified what Waxman told them about Morrison, appellant could not have suffered prejudice by the exclusion of Fay Wood's testimony.

No Error in Instructions.

[9] Appellant next contends that the court in its instructions erred in refusing to give the last paragraph of Caljic Instruction No. 231 [2] and that in failing to do so the court effectively put aside the requirement that one cannot be convicted of

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[2] Sometimes it is difficult to determine which, if any, of three forms of theft the facts of the case show was committed, because while the distinction between them is real, the evidence may be susceptible of different reasonable interpretations. Those three forms of theft are: (1) Embezzlement; (2) Obtaining property by false pretenses; and (3) Larceny by trick and device.

When one receives the possession of property lawfully by virtue of the fact that it is entrusted to him and thereafter he violates his trust and fraudulently diverts the property to his own use or to a use not authorized by the owner, his theft is called embezzlement.

When one knowingly and with design uses some fraudulent representation or pretense as a means of obtaining property from another who, in parting with it, intends to transfer title as well as possession to the person who so obtains possession, the theft is called obtaining property by false pretense.

When one obtains possession of the property of another by some trick or device, intending to convert it to his own use, and to permanently deprive the owner of it, and the owner, although parting with possession to such person, does not intend to transfer his title to that person, the theft is called larceny by trick and device.

If you should find that the defendant committed any of the three kinds of theft just mentioned, you should return a verdict of guilty, and it will not be necessary or proper for you to state in your verdict which of the three forms of theft was committed.

[This paragraph not given]

However, it is necessary that you all agree as to which of the three types of theft was committed. If you should not be able to do that, the unanimity of decision necessary to warrant a verdict of "guilty" would be lacking, and it would be improper for you to deliver such a verdict.

a criminal offense in a jury case without complete unanimity of decision by the jurors.

No error occurred. The last paragraph is not necessary. Its omission was proper since the jury were required only to determine as to each count whether the crime of grand theft had been committed. People v. Jones, 61 Cal.App.2d 608, 622, 143 P.2d 726; People v. Caldwell, 55 Cal.App.2d 238, 256, 130 P.2d 495; People v. Chavez, 37 Cal.2d 656, 657, 670, 234 P.2d 632. Courts and lawyers are no longer required to puzzle over fine distinctions between the crimes formerly denounced by separate statutes. The crime is complete when the criminal agency appropriates the property of another to his own use without regard to the particular route he chooses to effectuate his wicked purpose. People v. Moorhead, 104 Cal.App.2d 688, 694, 232 P.2d 268; People v. Hiden, 102 Cal.App.2d 655, 659, 228 P.2d 95. The question submitted was whether the accused had committed theft. The jurors might not agree on the ancient technical distinctions of the three crimes, but at the same time agree that the defendant stole the money. Appellant's constitutional rights were not invaded since the jury was specifically informed that "in order to return a verdict it is necessary that all twelve jurors agree to the decision."

[10] There was likewise no error in the court's action in modifying appellant's offered instruction [3] with regard to obtaining money by false pretenses. The omission of the third paragraph was proper since it was virtually a repetition of the legal principles enunciated in the preceding paragraphs. The practice of repeating instructions upon a particular subject though in various forms is not to be commended. People v. Ruiz, 88 Cal.App. 502, 505, 263 P. 836.

No discussion need be had of appellant's contention that the court erred in refusing his instruction as to the intent required for the crime of theft by trick and device or false pretenses. Appellant's offered instruction was merely repetitive of a principle stated in other instructions.

[11] At the conclusion of the People's case appellant made a motion that the district attorney be ordered to elect the theory on which he was proceeding—embezzlement, larceny by trick and device or obtaining money by false pretenses. The court's denial of that motion is now assigned as error. Such ruling was correct. Because the technical distinctions between these various types of larceny have been abolished and all consolidated under the one heading, Penal Code, secs. 484–490a, an election is not required. Whenever any statute now mentions the old offenses, it is to be read as if the term "theft" were substituted for them. Inasmuch as the distinctions have been removed and the jury is relieved of the duty to designate the specific classification of the crime under the old statutes, it follows that the district attorney is under no legal duty to make an election. It is the prosecutor's sole duty to present the evidence and it is then the function of the jury, under proper

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[3] Where one is charged with having obtained money by false pretenses or larceny by trick or device, and the evidence shows that he did not make any representations to the complaining witnesses but that such representations were made by his agent, it must be proved that the defendant directly authorized or consented to such representations by the agent, because authority to do a criminal act will not be presumed.

In order to find the defendant guilty of these charges on the theory of obtaining money on false pretenses or by trick and device, it must be proved that he had a specific criminal intent to defraud the complaining witnesses at the time that the alleged criminal act was committed, and such intent cannot be imputed to the defendant because of an act of his agent unless it is also shown that defendant directly participated or consented to such act or representations.

[Not given] Therefore, I instruct you that if you find that S. C. Montrose was the agent of the defendant and made any false representations which were not directly authorized by the defendant or consented to by him, you cannot hold the defendant responsible for such representations, even though they were made by Montrose in connection with the transaction for which he may have been retained by the defendant.

instructions, to determine whether appellant committed "theft" by appropriating "property not his own, with intent to take it." People v. Hiden, supra, 102 Cal.App. at page 679, 228 P.2d at page 97.

The judgment and order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

114 Cal.App.2d 375

ROMACA v. MEYER.

No. 15222.

District Court of Appeal, First District,
Division 1, California.
Nov. 26, 1952.

Action under the Fair Labor Standards Act of 1938, Section 1 et seq., 29 U.S.C.A. Section 201 et seq., for overtime pay, liquidated damages, and attorney's fees. The Superior Court in and for the County of Santa Clara, Anthony Brazil, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, Bray, J., held that plaintiff, former employee of defendant, was engaged in occupation closely related and directly essential to production of goods for "commerce" as quoted word is used in Fair Labor Standards Act to mean trade and commerce among several states or from one state to any place outside thereof.

Judgment reversed.

1. Labor Relations 🔑1169

Where tool and die maker while in defendant's employ worked on parts which were sold and delivered to a buyer in state, and such buyer assembled such parts and then shipped them to another state pursuant to a contract between such buyer and its consignee, such employee was engaged in occupation closely related and directly essential to production goods for "commerce" as quoted word is used in Fair Labor Standards Act to mean trade and commerce among the several states or from one state to any place outside thereof. Fair Labor Standards Act of 1938, §§ 1 et seq., 3, 7, 29 U.S.C.A. §§ 201 et seq., 203, 207.

See publication Words and Phrases, for other judicial constructions and definitions of "Commerce".

2. Labor Relations 🔑1134, 1135

An employer is within provisions of Fair Labor Standards Act if he knew, intended, hoped, expected, or had reason to believe that his product would move in, or affect, interstate commerce. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

3. Labor Relations 🔑1514

In action under Fair Labor Standards Act by defendant's former employee to recover overtime pay, liquidated damages and attorney's fees, employee had burden of showing that defendant knew, intended, hoped, expected, or had reason to believe that his product would move in, or affect, interstate commerce. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

4. Labor Relations 🔑1525

In action under Fair Labor Standards Act by defendant's former employee to recover overtime pay, liquidated damages and attorney's fees, wherein defendant claimed not to be subject to Act, plaintiff made out a prima facie case when plaintiff showed that defendant's products went into interstate commerce, and defendant then was required to show that defendant neither knew or should have known that defendant's product which was sold and delivered within state would move in interstate commerce. Fair Labor Standards Act of 1938, §§ 1 et seq., 3, 7, 29 U.S.C.A. §§ 201 et seq., 203, 207.

5. Labor Relations 🔑1519

An employee who brings action under Fair Labor Standards Act for overtime compensation has carried out his burden if he proves performance of work for which he was improperly compensated and produces sufficient evidence to show amount and extent of that work as a matter of just and reasonable inference, and burden then shifts to employer to come forward with evidence of precise amount of work performed or with evidence to negative reasonableness of inference to be drawn from employee's evidence. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

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Mack & Jorgenson, Samuels & Thoits, Palo Alto, for appellant.

Long & Levit, David C. Bogert, San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendant, in an action for overtime pay, liquidated damages and attorney's fees, brought under the federal Fair Labor Standards Act of 1938, 52 Statutes 1060, 29 U.S.C.A. §§ 201–219.

Questions Presented.

Primarily: (1) Was plaintiff engaged in working on, or in any process necessary to the production of, goods for interstate commerce? (2) If so, can his employer be held under the act without proof that the latter knew that the goods were for interstate commerce?

Facts.

Defendant manufactures tools, dies and parts, at Mountain View. For a period he employed plaintiff as a tool and die maker. The tools, dies and parts he worked on were sold by defendant to several concerns. Of those concerns the two in question here are Dalmo-Victor, located in Redwood City, and Marchant Calculating Company located in Emeryville. Plaintiff worked on cover dies, i. e., dies which would make metal cases for calculating machines. These cover dies were sold and delivered by defendant to Marchant at Emeryville. Each die would make thousands of these cases. Plaintiff also worked on certain parts to go on radar units, which parts were sold and delivered to Dalmo-Victor at Redwood City. There they were assembled into radar units which were then shipped east to Westinghouse, pursuant to a contract between Dalmo-Victor and Westinghouse. After leaving defendant, plaintiff was employed by Dalmo-Victor and reworked slightly and placed on the radar units the parts which defendant had delivered. Defendant testified that he did not learn of the contract between Dalmo-Victor and Westinghouse until after he had produced the parts which Dalmo-Victor received. There is no evidence as to whether or not any Marchant calculators upon which defendant's cover dies were used were shipped out of the state. The evidence shows that during his employment plaintiff worked considerably overtime, for no part of which was he paid time and a half.

The court found that none of the *tools or dies* upon which plaintiff worked were sold to or used by purchasers engaged in the production of any products produced or used in interstate commerce or outside the state; that none of the processes or services performed by plaintiff affected or were necessary to the production of any products leaving California nor were any of said *tools or dies* used in interstate commerce or affected it.

The Law Applicable.

29 U.S.C.A. § 207, provides that no employer shall employ any of his employees "who is engaged in commerce or in the production of goods for commerce" for a work week longer than 40 hours unless the employee receives time and a half for the overtime. At the time this action was filed section 203 defined "goods" as "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof. (j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee *shall be deemed to have been engaged in the production of goods if* such employee was employed in *producing,* manufacturing, mining, handling, transporting, or in any

other manner *working on* such goods, *or in any process* or occupation *necessary to the production thereof,* in any State."[1]

Section 203(b) defines "commerce" as trade or commerce among the several states or from any state to any place outside thereof.

Section 203 was amended affective January 26, 1950, changing "or in any process or occupation necessary to the production thereof" to "or in any closely related process or occupation directly essential to the production thereof". As to the radar parts made for Dalmo-Victor it is obvious that they were necessary to the production of the units shipped by Dalmo-Victor to Westinghouse. The process of working on them by plaintiff at defendant's plant was both closely related and directly essential to the production thereof, so it is immaterial whether the original section or the section as amended is applied.

Production of Goods for Interstate Commerce.

In McComb v. Farmers Reservoir & Irrigation Co., 10 Cir., 167 F.2d 911, reservoir tenders, ditch riders, etc., of an irrigation company which sold and delivered water to farmers whose crops were processed and the finished products moved in interstate commerce were held to come under the act. "* * * their work is vital and essential to the integrated effort which brings about the movement of the finished products in commerce." 167 F.2d at page 914. In Waialua Agr. Co. v. Maneja, D.C., 97 F.Supp. 198, employees who maintained sugar plantations housing in which the company's employees and their families lived were held to be engaged in production of goods for commerce. In Harris v. Crossett Lumber Co., D.C., 62 F.Supp. 856, the work of the employee was held to come under the act. He was a pumper and tender of water wells. The water produced by the wells was pumped into a reservoir, from which it was conveyed to his employer, a lumber company, and to other industries operated in conjunction with the lumber mills. Seventy to 90 per cent of the products of the employer's mills moved in interstate commerce. In Sermond v. Lotz, 24 N.J.Misc. 182, 47 A.2d 432, the employee worked for an ice company. He pushed the ice down a chute and made it available for loading upon his employer's delivery trucks. The employer sold ice to a dealer who in turn sold it to a railroad company for use in cooling drinking water to be used by the railroad's employees who were engaged in interstate commerce. The ice was delivered to the railroad company by the plaintiff's employer for the dealer's account. The employer also sold ice directly to a dyestuff manufacturer to be used to lower the temperature of the chemicals used in compounding the dyestuffs. These were shipped in interstate commerce. It was held that the employee came within the act. In Chapman v. Home Ice Co. of Memphis, 6 Cir., 136 F.2d 353, a part of the defendant's business was selling and delivering to interstate railroads ice to be placed in refrigerator cars for preserving shipments of perishable commodities to other states. Plaintiff employee was held to be engaged in interstate commerce. In Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 63 S.Ct. 125, 87 L.Ed. 83, it was held that an employee of an owner and operator of drilling equipment who contracted with owners and lessees of oil land to drill for oil, which oil when produced from wells so drilled was to be transported in interstate commerce, came within the act.

These are only a few of the many cases demonstrating how liberally the courts interpret "interstate commerce" as applied to the Fair Labor Standards Act. In our case the work done by plaintiff was more directly connected with the finished product than any of the work in the above mentioned cases. Without the parts worked on by plaintiff and sold by defendant to Dalmo-Victor there could have been no radar units to be shipped to Westinghouse; and without the dies which went to Marchant there could have been no covers for the calculating machines.

[1] As to the Dalmo-Victor parts the finding that plaintiff's work on them did

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1. Unless otherwise noted, all italics added.

not affect or go into interstate commerce is erroneous.

Knowledge of Employer.

In its memorandum opinion the court stated that the goods sold to Dalmo-Victor were sold by defendant in intrastate commerce—the later sale to Westinghouse in Maryland "being but an afterthought; not at all contemplated by the original sale." Just what the court meant by this statement it is difficult to determine. There was no evidence that the sale was an afterthought. The evidence shows that the material worked on went into interstate commerce but that defendant did not know until after delivery was made to Dalmo-Victor, that the latter had a contract with Westinghouse.

The evidence in this case, then, is that the only products worked on by plaintiff shown to have affected interstate commerce were the Dalmo-Victor parts. Defendant is not shown to have known that they were to be so used until after they were produced. Does such knowledge have to be shown?

In Cullum v. Stevens, D.C., 46 F.Supp. 73, the judge stated: "The question is here squarely raised, whether the Act applies where the employee was actually producing goods for commerce, as defined by the Act, while he and his employer were wholly unaware of that fact." In holding that the lack of such knowledge did not relieve defendant of civil liability, the judge pointed out that such apparently was the intent of Congress because of an "absence in the Act of any qualifying words such as knowingly, willfully, etc., in the civil liability provisions of the Act, and their presence, on the other hand, in all of its criminal liability provisions." 46 F.Supp. at page 74. He then states 46 F.Supp. at page 74: "* * * the law was carefully so worded, whether an employer violated it and became liable to any employee for minimum wages or overtime, or both, does not depend upon, or require, proof that the violation was willfully or knowingly or intentionally done. It simply provides for liability, if it is done. Further, the burden of proof is on plaintiffs in these cases and, as a practical matter, Congress could readily visualize that to require proof by the employee that his employer knew or believed that he was producing goods for interstate commerce would often be a burden impossible of discharge. This is so, because it would involve insurmountable difficulties in proving knowledge as a fact by affirmative proof, but also still greater difficulty in offering circumstantial proof, that would impute sufficient legal knowledge to the employer to enable him to determine for himself whether his production of goods was for commerce, as defined. * * * Again I say, the lack of knowledge of defendant that the devices he made were going into interstate commerce, and therefore, his honest belief that his business did not come under the Act can constitute no defense; that however unintentionally or unwittingly he may have violated the Act, if he nevertheless did violate it, cannot save him from the civil liability, which the law guarantees to the employee."

In the Cullum case the judge prefaced his ruling as follows: "My construction of the Act is, the lack of such knowledge did not relieve defendant of civil liability where, as here, a substantial portion of the devices [on which the plaintiff worked] were being steadily and directly sold into other States by the local party for whom they were made." In view of that preface, it may be that the holding does not go to the extent of establishing liability under all circumstances where the product affects interstate commerce. If it does, it would appear to be the only opinion going that far. In Bagby v. Cleveland Wrecking Co., D.C., 28 F.Supp. 271, at page 272, the court said: "The mere fact that goods which are manufactured or produced locally pass later into interstate commerce does not make the transaction one constituting interstate commerce." The rule has been further discussed in the following cases.

In Warren-Bradshaw Co. v. Hall, supra, 317 U.S. 88, 63 S.Ct. 125, the contention was made that the employer was an independent contractor not financially interested in the wells he drilled and having no intention, expectation or belief that any oil produced would be shipped in interstate commerce, and hence did not come under the act. The court did not pass upon the question as to the necessity for knowledge by the employer, saying 317 U.S. at page 92, 63 S.Ct. at page 127: "Assuming that such expectation, or a reasonable basis therefor, was necessary on petitioner's part before the application of the Act to petitioner, it is here present. The record contains ample indication that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states."

In Schulte Co. v. Gangi, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114, the court was considering the application of the act to building service and maintenance employees of petitioner who operated a 23-story loft building. There were twelve tenants engaged in producing garments for nontenant city business organizations which subsequently sold the articles in interstate commerce. It was claimed that there was no evidence that any of the tenants knew at the time of production and as to four of them that they did not even know later, that their products were to be shipped in interstate commerce. The Circuit Court of Appeals, 2 Cir., 150 F.2d 694, 697, held: "And the testimony clearly shows that at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other states. This is all that had to be shown to constitute them interstate producers." The Supreme Court held, 328 U.S. at page 121, 66 S.Ct. at page 931: "* * * we think the conclusion of the Circuit Court of Appeals that these tenants had reasonable grounds to anticipate that material quantities of their production would move interstate is well supported. It is not essential that individual products should be traced. It is sufficient that from the circumstances of production, a trier of fact may reasonably infer that a producer has grounds to anticipate that his products will move interstate. * * * Producers may be held to know the usual routes for distribution of their products."

Another statement of the rule appears in Tobin v. Celery City Printing Co., 5 Cir., 197 F.2d 228, 229: "In determining the coverage of the Act, a manufacturer can not assume an attitude of detached aloofness from his product, ignoring the ultimate purpose or use for which it is intended. If he knows, or reasonably should know, that in the normal and ordinary course of business his product will move in interstate commerce, or if he intends or expects that it will so move, either alone or in connection with some other product, he is a producer of goods for commerce within the meaning of the Act. Actual knowledge that his product will so move is not essential. Nor is it of any consequence that the manufacturer's activities in connection with the product terminate before it moves in interstate commerce."

In Grippentrog v. Cheese Makers' Mfg. Co., 245 Wis. 1, 13 N.W.2d 391, the court said: "* * * in the absence of any proof to show that cheese boxes produced by defendant during the times in question moved in interstate commerce, *or that defendant intended, hoped or expected, or had reason to believe that they would so move,* there cannot be sustained any recovery on account of overtime in the production thereof." 13 N.W.2d at page 394.

[2] In spite of the broad language in the Cullum case, we believe that the true rule is that expressed in the other cases, supra, namely, that the employer is brought within the provisions of the act if he knows, intended, hoped, expected or had reason to believe that his product would move in, or affect, interstate commerce.

[3, 4] In our case, there was sufficient evidence from which the court might have inferred that the type of work being done for Dalmo-Victor by defendant, and defendant's general knowledge of the products of that company, were such that defendant knew, or should have known, that in the ordinary course of business his product would move in interstate commerce. While the burden was on plaintiff, he made out a prima facie case when he showed that defendant's products did go into interstate commerce. It was not sufficient for defendant then to show only that he did not know of the Westinghouse contract. He

was required, under the Tobin case, supra, 197 F.2d 228, and even under the Cullum case, supra, 46 F.Supp. 73, to show that he neither knew nor should have known that his product would move in interstate commerce, and the court should have made a finding on the subject. The absence of such a finding requires a reversal.

Marchant.

As to the dies delivered to Marchant, as pointed out before, there is no evidence that the calculators upon which they were used went into interstate commerce, nor that Marchant was engaged in interstate commerce. Plaintiff contends that a substantial portion of Marchant's products go into interstate commerce, and that the trial court and this court are required to take judicial notice of that fact.

The trial court made no express finding on the subject, nor can we find in the record any request in the trial court that it take judicial notice of the matter. (There may have been briefs on it, although the record fails to show that there were.) Inas much as the case has to be reversed, we do not deem it necessary to determine whether the tests as to judicial knowledge, well stated by Mr. Justice Olney in Varcoe v. Lee, 180 Cal. 338, 181 P. 223, have been met. As the case has to be retried, it appears to us that in the interests of justice evidence concerning the scope of Marchant's activities should be offered, and the matter further considered by the court.[2]

[5] Defendant contends that plaintiff did not prove the overtime chargeable to the Dalmo-Victor and Marchant jobs. Plaintiff testified that he made out the time cards which his employer kept and that from these cards he had copied his time. This copy was admitted in evidence without objection. Then defendant introduced in evidence the time cards which showed the job numbers of the work plaintiff was engaged in during the period in question. Thus, the overtime chargeable to the particular job was before the court.

> "* * * an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." Lewellen v. Hardy-Burlingham Min. Co., D.C., 73 F.Supp. 63, 66; Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515.

At the end of the trial the court suggested that the parties agree on the number of overtime hours. Defendant had testified that he had paid plaintiff for a certain amount of overtime, not in cash but in hours. Plaintiff denied this. The parties then stipulated as to the total overtime, to be reduced, however, by a designated number of hours, if the court believed defendant's testimony. The court did not find on this question. Thus there was before the court sufficient evidence on the subject. Undoubtedly on the new trial this matter can be cleared up.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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[2] It should be pointed out in this connection that "It is truly said that the power of judicial notice is, as to matters claimed to be matters of general knowledge, one to be used with caution. If there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required". Varcoe v. Lee, supra, 180 Cal. at page 345, 181 P. at page 226.

114 Cal.App.2d 443

IDEAL HARDWARE & SUPPLY CO. v. DEPARTMENT OF EMPLOYMENT et al.

Civ. 18985.

District Court of Appeal, Second District, Division 3, California.

Nov. 26, 1952.

Successor-employer's action for refund of contributions under Unemployment Insurance Act, predicated upon claim that it was entitled to benefit of reduced contribution rate enjoyed by its predecessor. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., rendered judgment adverse to plaintiff, and it appealed. The District Court of Appeal, Shinn, P. J., held that a prior adjudication of the issue involved was res judicata.

Affirmed.

1. Taxation ⚷497

Successor-employer was properly permitted to maintain proceeding in mandate to compel transfer of its predecessors favorable reserve account and reduced contribution rate under Unemployment Insurance Act. Gen.Laws, Act 8780d, §§ 37 et seq., 41.5; Code Civ.Proc. § 1094.5.

2. Judgment ⚷713(2), 720, 725(1)

An adjudication is conclusive and a bar to a subsequent action upon same cause of action as to all matters that were litigated or that could have been litigated, but if later action is upon different cause of action the prior adjudication is conclusive only as to matters actually or necessarily determined therein.

3. Judgment ⚷585(2, 3)

For purposes of res judicata doctrine, "cause of action" relates not to remedy involved or relief asked, but to right or obligation which is sought to be enforced; and if different title, right or obligation is pleaded in second action, cause of action is different, even though relief sought is same, but if second action is based upon same right or obligation, cause of action is same even though different or additional relief is sought.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause of Action".

4. Judgment ⚷585(2)

Denial of writ of mandate to compel Employment Department to transfer predecessor-employer's reserve account and reduced contribution rate under Unemployment Insurance Act was conclusive against successor-employer's right to secure refund of payments made at higher contribution rate, since both actions were brought to establish same right, to-wit, successor-employer's right to have favorable contribution rate transferred.

5. Appeal and Error ⚷204(4)

In absence of proper objection in trial court, error could not be predicated upon admission in evidence of findings and judgment in the former proceeding apart from pleadings in that proceeding, even though such findings and judgment were entitled to full effect only if they were within issues in former proceeding.

6. Appeal and Error ⚷1056(6)

Any error in exclusion of evidence could not have been prejudicial where action was barred by prior adjudication.

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Trent G. Anderson, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, William L. Shaw, and Vincent P. Lafferty, Deputy Attys. Gen., for respondents.

SHINN, Presiding Justice.

Prior to August 1, 1946, Weston F. Kreck and C. W. Kreck conducted as copartners a wholesale and retail hardware business under the name of Ideal Hardware and Supply Co. On that date the partnership was dissolved. The partnership had conducted a wholesale business at one location and a retail business at another. Weston F. Kreck acquired the wholesale division and C. W. Kreck the retail division, and each was thereafter operated separately. On April 25, 1947, Weston F. Kreck made an equitable assignment of assets for the benefit of creditors to M. W. Engleman who operated the business with and for the benefit of Kreck. Plaintiff corporation acquired the wholesale business on September 30, 1948, and has ever since conducted the same.

The partnership had had a favorable employment record and a resulting favorable reserve account under the Unemployment Insurance Act (3 Deering's Gen.Laws, Act 8780d, Art. 4) and was entitled to a contribution rate of 1.5 per cent rather than the usual rate of 2.7 per cent. After dissolution of the partnership the Department of Employment notified Weston F. Kreck his future rate of tax contribution would be 2.7 per cent. As to Engleman, as assignee, the account was transferred with a rating of 2.7 per cent. Kreck filed a petition with the department, and later with the Appeals Board, for transfer of the partnership reserve account, claiming to be entitled to the 1.5 per cent rating of the predecessor partnership. Kreck's claim was based on § 41.5 of the act. At the time of the transfer the act provided the reserve account would be transferred to a successor employer if he acquired "substantially all of the assets" of the predecessor employer. In 1947 the section was amended to also give the right of transfer of the former rating to one who acquired "a distinct and severable portion of such organization, trade, or business of any employer" etc.[1] The section applies retroactively to transfers made prior to the effective date of the act.[2] The Appeals Board of the department denied the petition for reassessment on March 25, 1949. In its decision the Board found that the value of the wholesale business was $588,272.45 and the value of the retail business $233,777.29. Thereafter, Weston F. Kreck, as successor to the partnership and the Ideal Hardware and Supply Company as successor to Kreck, petitioned the superior court for a writ of mandate to compel the department to transfer the partnership reserve account and merit rating to Kreck and thence to the corporation. An alternative writ issued and after hearing on briefs and the Appeals Board record the writ was discharged. Findings were made to the effect that Kreck was not entitled to the requested transfer under § 41.5 as it existed when he took over because he did not acquire "substantially all of the assets" of the former employer, the partnership. It was further found that the section as amended did not apply to Kreck as he was not an employer when the amendment became effective in 1947 and did not apply to the corporation because it was not a direct successor to the partnership. No appeal was taken from the denial of the peremptory writ.

The corporation brought the present action for refund of payments made at the 2.7 per cent rate, contending it was entitled to the 1.5 per cent rate of the partnership under § 41.5 of the act. The trial court concluded that all issues raised in this action were decided adversely to plaintiff in the mandate proceeding, and that under the doctrine of res judicata the prior determination was conclusive. Findings and conclusions also were against plaintiff on the merits and in accordance with those in the mandate proceeding. Judgment was for defendants and plaintiff appeals. We are of the opinion that the court correctly applied the doctrine of res judicata and that the judgment must be affirmed on that ground.

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[1] As here applicable § 41.5, including the emphasized portions added in 1947, reads in part as follows:

"Whenever any employing unit acquires the organization, trade, or business, or substantially all of the assets thereof, *or a distinct and severable portion of such organization, trade, or business of any employer,* * * * and continues such organization, trade, or business, *or such distinct and severable portion thereof* without substantial reduction of personnel resulting from such acquisition, the separate account, actual contribution and benefit experience and pay rolls of the predecessor or that part thereof, as determined by authorized regulations, which pertains to the organization, trade, or business, or portion thereof acquired, shall be transferred to the successor employer for the purpose of determining its rate of contribution after such acquisition with the same effect for such purpose as if the operations of the predecessor had at all times been carried on by the successor. * * *"

[2] "The provisions of this section shall apply to acquisitions prior as well as subsequent to the effective date of this act; provided, that notice of such acquisitions shall have been given to the commission within one year of the date of such acquisition, or within ninety days after the effective date of this act, whichever is later; and provided further, that transfer of accounts with respect to acquisitions consummated prior to the effective date of this act, not previously authorized prior to said effective date, shall not affect any rate of contribution for any period prior to said effective date."

With respect to the doctrine of res judicata plaintiff contends it was incorrectly applied and advances as one of the reasons the claim that the court was without jurisdiction to try the proceeding in mandate, and that the former determination and the findings made therein should be disregarded altogether. It is further urged that the present action for the refund of taxes paid under protest is upon a different cause of action from the one prosecuted in the former proceeding to compel the transfer of the reserve account. It is therefore argued that the former judgment cannot operate as a bar and that the doctrine of estoppel does not apply for the reason that facts are relied upon in the present action as to which there was no finding in the former action.

[1] The first point requires consideration of certain provisions of two sections of the act. §§ 41.5 and 45.11d read in part as set out below.[3-4] Plaintiff urges a construction of § 45.11d that would apply the prohibition to petitions for transfer of reserve accounts, petitions for reassessment of contribution rate and petitions against benefit payment charges to any employer's account, and says: "The remedies contained in Section 45.11 apply to all problems of the employer, and therefore override and cover Section 41.5 as well as the other sections, but give the employer a right to a trial *de novo* on his cause by claim for refund." The conclusion plaintiff reaches is that § 41.5 is not effectual to give the employer the right to maintain a proceeding in mandate to compel the transfer of a reserve account and rating. But the statute does grant that right and mandate is a proper remedy. Code Civ.Proc. § 1094.5; Dare v. Bd. of Medical Examiners, 21 Cal. 2d 790, 136 P.2d 304. Whether proceeding under the section would deprive the litigant of any privilege he might enjoy in an action for refund of taxes cannot limit the plain language and intent of the statute. We think it is clear that the court had jurisdiction to adjudicate the issues in the mandate proceeding.

It is asserted by plaintiff, and in the brief of defendants it is conceded, that the present action is upon a cause of action different from the one prosecuted in the former proceeding.

[2] It is in this view of the case that the parties discuss the general rule of res judicata that an adjudication is conclusive and a bar to a subsequent action upon the same cause of action as to all matters that were litigated or that could have been litigated, whereas if the later action is upon a

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3. "In event of a denial of application for transfer of reserve account, any interested party shall have the right to petition for hearing before the Appeals Board and the decision of the Appeals Board, after affording the parties reasonable opportunity for fair hearing, shall be final unless within sixty days after the mailing of the notice of determination of the Appeals Board any interested party may bring an action against the commission with respect to such determination to require the transfer of the reserve account as required by law."

4. "[*Process to prevent or enjoin collection: Suit not to be maintained unless claim filed: Suit on claim: Failure to mail notice of claim.*] No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contributions sought to be collected. No suit or proceedings shall be maintained in any court for the recovery of any amount of contributions, interest or penalties alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been filed pursuant to this section."

different cause of action the former adjudication is conclusive only as to matters actually or necessarily determined in the former action. Plaintiff points out that in the former proceeding the court made the following finding: "That Weston F. Kreck did not acquire the organization, trade or business or substantially all the assets of any other employer and was not entitled to the transfer of the reserve account of any other employer or to the transfer of any rate of contribution of any other employer; that Weston F. Kreck had no property in or right to the transfer of an experience rating under the Unemployment Insurance Act at the rate 1.5%" and plaintiff says that it has acquired "a distinct and severable portion of such organization, trade or business of any employer," namely, the partnership, the wholesale business being a distinct and severable portion of the trade or business of the partnership, and that its acquisition carried with it the right to a transfer of the reserve account and rating even though the portion so acquired was less than substantially all of the assets of the business of the partnership. Plaintiff also states, correctly, that there was no express finding as to these facts in the mandate proceeding. It then contends that it has the right to re-litigate its claim upon the basis of a fact not determined against it in the former proceeding, namely, that it acquired a distinct and severable portion of the business of the partnership. In brief, plaintiff contends for the rule of estoppel which applies when the causes of action are different and insists that the former judgment was not a full adjudication of its rights. We need not consider the conclusion inasmuch as we cannot agree that the causes of action are not the same.

[3] The term "cause of action" has different meanings in different connections. It is commonly used in pleading as applying only to the relief sought, even though the separately pleaded claims have origin in the same right or obligation. But this is not the meaning of "cause of action" as the term is used in stating the doctrine of res judicata. When used in this connection the term relates not to the remedy involved or the relief asked, but to the right or obligation which is sought to be enforced. If a different title, right or obligation is pleaded in the second action, the cause of action is different, even though the relief sought is the same. Ball v. Stephens, 68 Cal.App.2d 843, 851, 158 P.2d 207. But if the second is based upon the same right or obligation the cause of action is the same even though different or additional relief is sought. The leading case of Frost v. Witter, 132 Cal. 421, 64 P. 705, contains an able discussion of the subject of identity of causes of action.

It is the title, right or obligation sought to be established or enforced, not the remedy or the relief sought, which determines the nature and substance of the cause of action. When this has once been adjudicated it cannot be re-litigated upon any grounds that were or that could have been determined in the former action. Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 511, 512, 258 P. 387; Big Boy Drilling Corp. v. Rankin, 213 Cal. 646, 649, 3 P.2d 13; Todhunter v. Smith, 219 Cal. 690, 694, 28 P.2d 916; Andrews v. Reidy, 7 Cal.2d 366, 370, 60 P.2d 832; Sutphin v. Speik, 15 Cal.2d 195, 201, 99 P.2d 652, 101 P.2d 497; Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242; Wulfjen v. Dolton, 24 Cal.2d 891, 895, 151 P.2d 846; McManus v. Bendlage, 82 Cal.App.2d 916, 923, 187 P.2d 854.

[4] Although the remedy presently invoked and the relief sought are different, the facts which were determinative of plaintiff's right were the same in each case. The right to have the favorable rate transferred, which was an issue in the first case, is the very one upon which plaintiff relies in the present action for the refund of taxes. That issue has been fully tried and determined. The findings and judgment in the former proceeding fully support the defense of res judicata.

[5] Plaintiff assigns error in the admission in evidence of the findings and judgment in the former proceeding over its objection and contends they were inadmissible apart from the pleadings in that proceeding. The point made is that in order to have full effect the findings and judg-

ment must be within the issues. We do not find that this ground of objection was urged by plaintiff. When the objection was overruled plaintiff reserved the right, which was granted, to introduce further evidence on the subject. The pleadings were not brought to the attention of the court and although a motion was made to strike the findings, conclusions and judgment, it was not upon the ground that they were not responsive to the issues.

[6] Certain evidence was offered by plaintiff and excluded upon objection. It related only to the assets that were acquired by Weston F. Kreck and hence to the merits of the action. If there was error in the ruling it could not be deemed prejudicial in view of our conclusion that the present action was barred by the former adjudication.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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114 Cal.App.2d 328

LOBDELL et al. v. MILLER et al.
MILLER v. LOBDELL et al.
Civ. 4448.

District Court of Appeal, Fourth District, California.
Nov. 21, 1952.

Rehearing Denied Dec. 18, 1952.
Hearing Denied Jan. 19, 1953.

One of the vendors of realty brought action against purchasers to foreclose chattel mortgage and trust deed given as security for payment of note given as part of purchase price of realty, and the purchasers brought an action against the vendors to rescind contract of sale and to recover damages. The Superior Court of Orange County, Kenneth E. Morrison, J., entered judgment adverse to the vendors, and they appealed. The Court of Appeals, Griffin, J., held that evidence sustained finding that vendors had been guilty of false representations, so as to entitle purchasers to rescind.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

Where there is sufficient substantial evidence supporting findings of trial court, an appellate court will not disturb such findings.

2. Fraud 🔑58(2)

Fact that, after purchasers purchased hotel bathhouse, mineral springs, swimming pool, cabins and realty, income therefrom did not amount to $700 a month, though purchasers remodeled buildings and raised the rates, did not necessarily operate as conclusive proof that vendors' statement that the property brought in an income of $700 a month was false.

3. Vendor and Purchaser 🔑44, 123

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, evidence sustained trial court's finding that vendors falsely represented income from hotel, that such representations were known by vendors to be false at time they were made, and that purchasers acted to rescind within reasonable time after learning falsity of representations.

4. Vendor and Purchaser 🔑44

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, evidence sustained trial court's finding that vendors had falsely represented that the hotel property was, with one exception, the only unrestricted property within radius of about one mile that could be used for business purposes.

5. Vendor and Purchaser 🔑44

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, evidence sustained trial court's finding that vendors falsely represented that swimming pool had been approved by public authorities for public use and was ready to be opened.

6. Vendor and Purchaser 🔑44

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, evidence sustained trial court's finding that vendors had falsely represented that water spring, well and pumping plant on premises furnished adequate and sufficient water for needs of hotel.

7. Fraud 🔑23

Where no duty is imposed by law on purchasers of realty to make inquiry to discover false representations made by vendors, and where, under circumstances, a prudent man would not be put on inquiry, mere fact that means of knowledge are open to purchasers and purchasers have not availed themselves of them does not debar them from relief on actually discovering falsity of representations.

8. Vendor and Purchaser 🔑33

In order to debar purchasers of realty from having purchase of realty rescinded, on ground of false representations by vendors because purchasers were put on inquiry as to alleged false representations, circumstances must be such that inquiry on part of purchasers became a duty, and failure to make inquiry was a negligent omission.

9. Vendor and Purchaser 🔑33

In suit to rescind sale of realty, on ground of false representations by vendors, purchasers may still be entitled to rely on false representations though they conducted an investigation.

10. Vendor and Purchaser 🔑44

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, evidence sustained trial court's findings that there had been justifiable reliance by purchasers on allegedly false representations by vendors.

11. Fraud 🔑35

Ratification of a fraudulent transaction can only occur when person ratifying has full knowledge of facts.

12. Vendor and Purchaser 🔑33

Mere fact that purchasers of realty may have suspected that one or more of the many alleged false representations by vendors were false would not necessarily preclude recovery by purchasers in action to rescind the purchase, on other allegedly false representations.

13. Vendor and Purchaser 🔑33

Fact that purchasers of realty inspected the premises before buying was not conclusive that purchasers did not rely on alleged false representations by vendors, and would not preclude them from having the purchase rescinded.

14. Fraud 🔑22(1)

Where purchaser of realty is aware of suspicious circumstances or has learned falsity of one or more representations by vendor, purchaser is generally under legal duty to make complete investigation and may not rely on statements of vendor, but there are exceptions and buyer is not required to employ experts to investigate matters of a technical nature of which vendor has full knowledge and purchaser has none, and purchaser is not chargeable with knowledge of conditions which he fails to discover because of some artifice or deception of vendor.

15. Vendor and Purchaser 🔑33

Discovery of vendor's fraud and deceit after consummation of sale of realty and after purchaser has been prejudiced cannot defeat right of purchaser to prevail in action to rescind the purchase.

16. Vendor and Purchaser 🔑123

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, evidence sustained trial court's finding that purchasers were not guilty of laches in serving notice of rescission.

17. Vendor and Purchaser 🔑341(5)

In an action to rescind sale of realty, on ground of false representations by vendor, purchaser is entitled to recover consideration he gave, on restoration or offer of restoration of what he received, and is entitled to recover compensation for whatever consequential damages he may have suffered by reason of having entered into the contract, and purchaser is entitled to recover difference between actual value of that which he parted with and actual value of that which he received, together with additional damage arising from the transaction.

18. Vendor and Purchaser ⚷116

Where it is possible to bring about substantial justice by adjusting equities between purchasers and vendors of realty, fact that status quo cannot be exactly reproduced will not preclude purchasers from having the sale rescinded on ground of false representations by vendors.

19. Vendor and Purchaser ⚷341(5)

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, trial court, under its equitable powers, had right to fix agreed value of realty, which purchasers had deeded to vendors as part of purchase price, as the amount for which vendors should account to purchaser.

20. Appeal and Error ⚷989

An appellate court possesses none of the functions of the trial court in passing on weight of the evidence, and cannot assume to exercise them.

21. Appeal and Error ⚷989

Question of sufficiency of evidence, as a matter of law, to support a verdict or finding, may be presented to an appellate court for review, but its duties stop when it has determined that there is some substantial evidence to support it.

22. Appeal and Error ⚷989, 994(1), 1012(1)

An appellate court will not weigh evidence, pass on credibility of witnesses, or substitute its judgment thereon for that of the trial court, but will uphold the findings, even though appellate court would have decided otherwise if it had occupied place of trial judge.

23. Vendor and Purchaser ⚷341(5)

In action by purchasers against vendors to rescind sale of hotel, bathhouse, mineral springs, swimming pool, cabins, and realty, on ground of alleged misrepresentations by vendors, evidence sustained trial court's finding that plaintiff was entitled to recover damages of $37,772.90.

James E. Pawson, Long Beach, and Head, Jacobs & Corfman, Santa Ana, for appellants.

Tobias & Bernard, and E. J. Marks, Santa Ana, for respondents.

GRIFFIN, Justice.

These actions, bearing Superior Court numbers 52621 and 52412 respectively, were consolidated for the purpose of trial and on appeal. For convenience, the Lobdells will be referred to as plaintiffs, and William B. Miller and Frank O'Farrell as defendants. On a motion to dismiss the appeal, these actions were before this court for consideration. Miller v. Lobdell, 109 Cal. App.2d 628, 241 P.2d 30. A brief statement of the issues and factual background is there related. On July 2, 1947, plaintiffs, who had been in the restaurant business but never in the hotel business, purchased from defendant Miller a hotel, bathhouse, mineral springs, swimming pool, cabins and real property situated in Orange County. On July 21, 1949, Miller filed an action against the Lobdells to foreclose a chattel mortgage and trust deed given by them as security for the payment of a promissory note in the sum of $29,000. The Lobdells, on August 24, 1949, filed an action in the same court against Miller, his agent O'Farrell, and Orange County Title Company, to rescind the contract of sale and exchange, the note, trust deed, and chattel mortgage on the furnishings. This action was based upon alleged fraud, misrepresentation and concealment practiced by defendants prior to the exchange agreement. On February 5, 1951, judgment was rendered that Miller take nothing against the plaintiffs by reason of his complaint in the foreclosure action; the agreement of sale was rescinded; the note, trust deed and chattel mortgage were canceled, and the title company was ordered to reconvey the property. It was further decreed that the Lobdells recover judgment against Miller for $37,772.90, and that Miller, upon the payment of this sum, was entitled to have the personal property described in the chattel mortgage conveyed to him; that upon payment of said judgment and within 30 days thereafter, the Lobdells should convey to Miller the personal property described in the mortgage and the real property, he to become the owner thereof. Defendant Miller had owned property in Silverado Canyon, including the Shady Brook Hotel property here involved, for about 25 years. He subdivided various parcels and placed building restrictions on some of the subdivisions. The hotel property had been operated as a club and then as a hotel or health resort. The last lease was based upon a lease contract whereby Miller received a percentage of the income. Plaintiffs were interested by O'Farrell in the purchase of this property about May, 1947, who acted as exclusive agent for Miller. During these negotiations, which culminated in the sale of the property to plaintiffs, plaintiffs made various trips to inspect it, and each time were in the company of either one or both of the defendants. The sale price was $38,000, payable as follows: The conveyance to Miller of a duplex in the city of Long Beach at an agreed price of $10,000; $5,000 in cash, and the balance of $23,000 in installments evidenced by a promissory note in the sum of $23,000, which was secured by a deed of trust on the real property, and a chattel mortgage on the furniture and furnishings. The transaction was completed in July, 1947. Plaintiffs took possession about August 1st. They closed the hotel and undertook extensive remodeling and refurnishing of the buildings. They remained in possession until after the trial of this action, which was commenced on July 18, 1950. They expended $26,605 in making repairs, remodeling, and in refurnishing the hotel property, the cabins and bathhouse (not counting plaintiffs' time expended). As the repairs and furnishings progressed, certain parts of the buildings were opened for occupancy in September of 1947, but the entire program was not completed so that the hotel property as a unit could be offered for occupancy until well into 1948.

The cost of remodeling and refurnishing exhausted the resources of plaintiffs so that on June 18, 1948, Miller loaned them $9,057 to help pay for the same. The original note was canceled, the securities released and a new note for $29,000 was executed, which was secured by a deed of trust on the property as improved by plaintiffs, and a chattel mortgage on the new furniture and furnishings.

The evidence shows that defendants made various representations to the plaintiffs during the negotiations for the sale, which representations were of facts which the trial court found were false and fraudulent and were made for the purpose of inducing the plaintiffs to enter into the transaction. These statements, as found, were:

> "(a) That the business operations being conducted on the premises at the time of purchase, were, and for many months prior thereto had been, making an income of not less than seven hundred ($700.00) dollars per month.
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> "(b) That the hotel property being purchased was the only unrestricted property as a matter of record, and the only property permitted to be used for business purposes within a radius of approximately one mile with the one exception of a business already in operation known as 'Tommy's Cafe' immediately adjacent to the said hotel property.
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> "(c) That the swimming pool located on the hotel property had been and was then approved for public use by public authorities and was ready to be opened at any time; and that said swimming pool could be an immediate source of revenue and income; that such swimming pool facilities were in good order and working condition. * * *
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> "(d) That there existed a water spring, well and pumping plant on the premises being sold, with adequate and sufficient water for all the needs of the hotel, bath house, swimming pool and premises being sold, and that said water supply was entirely independent from any other source whatsoever; that the water springs had so much water that the purchaser could divorce himself from the water company serv-

ing the general area; that the purchaser would have all the water he would ever need and never have to worry."

The court then found "that the plaintiffs * * * believed and relied wholly upon the false and fraudulent representations of the said defendants * * * and would not have entered into said contract had they not believed and relied" thereon. "That plaintiffs, on or about the 18th day of June of 1948, and prior to the discovery of the false and fraudulent representations as herein found, mutually agreed with the defendant * * * Miller to a refinancing of the debt * * * that * * * certain statements and representations were made by defendant * * * Miller, and certain facts were suppressed, and concealed by * * * Miller, to induce plaintiffs to enter into such refinancing agreement. * * * That defendant * * * Miller continued to conceal and suppress, and failed to state, the true facts as hereinbefore found regarding the business income and business restrictions upon the said premises and properties * * * that plaintiffs' records show actual operating losses from the date of possession in July, 1947, to and including June 30, 1950, * * * That the plaintiffs had no knowledge of, or suspicion of, the falsity of said representations until the times herein found, and that plaintiffs could not, by the exercise of reasonable diligence, have discovered the falsity of said representations prior to the times herein found * * * that upon the suspicion of some, and the discoveries of other, false and fraudulent representations made by defendants to plaintiffs, as hereinbefore found, and during the month of April, 1949, plaintiffs informed defendant * * * Miller and * * * O'Farrell of such discoveries made, and their suspicions aroused. That thereafter and thereupon negotiations for the settlement of differences between plaintiffs and defendants were immediately initiated; that such negotiations for settlement as between plaintiffs and said defendants continued until on or about the 4th day of August, 1949, the date at which time plaintiffs gave Notice of Rescission * * * that * * * the plaintiffs believed that the controversies existing between the plaintiffs and defendants could be settled and adjusted without the necessity of legal action * * * that said defendants refused to adjust or compromise * * * It is not true that the plaintiffs, or either of them, have been guilty of laches and unreasonable delay in rescinding said agreement or in bringing this action." The court then found that the real and personal property described in the agreement of sale, "had a reasonable market value of twenty five thousand ($25,000) dollars, and no more."

[1] Counsel for defendants have announced familiarity with the time-honored rule that on appeal, where there is sufficient substantial evidence supporting the findings of the trial court, an appellate court will not disturb such findings, and accordingly in their argument before this court they have admitted that there is sufficient evidence to show that defendants made statements to plaintiffs about the income of the hotel property being $700 per month, as found in paragraph (a), that Miller said he believed he had enough water in the spring to take care of the entire hotel property, and that the purchaser could divorce himself from the water company and rely upon the supply of water from the spring. The question of the sufficiency of the evidence to support the findings of the alleged making of false representations, as found, is not particularly questioned. The main questions are, as set forth in defendants' brief: Did the plaintiffs have actual or imputed knowledge of material misrepresentations and with such knowledge, act so as to ratify the transaction, estopping rescission? (2) Is the judgment based upon an erroneous application of the law as to reimbursement, and is it supported by the evidence?

We have read in excess of one thousand pages of reporter's transcript and have examined the many exhibits in the record. It conclusively shows as to finding (a) that defendant O'Farrell represented to plaintiffs, during the negotiations for purchase and at the time of sale, that the hotel was making and had made $700 per month. Some of the testimony indicated this was a net return and other testimony indicated that it was a gross return. The evidence clearly shows that in either case this fact was false as to the year 1947, and that the highest gross monthly return for that year was $411 and the lowest was $219; in 1946, the highest was $563 and the lowest was $389.50; in 1945, the highest was $790 and the lowest $489; and in 1944, the highest was $799 and the lowest $393.

It is defendants' position that even though the statements claimed to have been made may have been false, plaintiffs discovered or should have discovered their falsity many months prior to the time when they claimed rescission based thereon; that under section 1691 of the Civil Code, rescission can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence; and that he must rescind promptly upon discovering the facts which entitle him to rescind. In support of the argument they cite such cases as Ruhl v. Mott, 120 Cal. 668, 677, 53 P. 304; Schneider v. Henley, 61 Cal.App. 758, 763, 215 P. 1036; and the dissenting opinion of Justice Schauer in Williams v. Marshall, 37 Cal.2d 445, 458, 235 P.2d 372.

[2] Although there is some evidence which might have supported a contrary finding, there is sufficient evidence to show that prior to the transaction agreed upon, plaintiffs had no knowledge of the income of the property other than what defendants told them. There is evidence that when plaintiffs were looking over the property with the question of income in mind, defendant O'Farrell told them to stay away from the present lessee because he "was not cooperating". There was practically no income from the premises during the remodeling period. It was not completed until approximately seven months after taking possession. At that time the rates were raised and the income did not amount to $700 per month. Counsel for defendants argue that this fact should have put plaintiffs on notice that the claimed representations made by defendants as to the income of the hotel were false. This fact would not necessarily operate as conclusive proof of the falsity of the statement. Sanders v. Park Beverly Corporation, 109 Cal.App. 2d 698, 241 P.2d 597, 600. There is evidence that plaintiffs did not discover the actual income from the property until long after the refinancing program had been completed. In the spring of 1949, they found an old book in one of the rooms indicating what the monthly income had been from the hotel from June, 1945, to July, 1947. This record, which was the guest record of the former lessee during that peiod was then taken to an auditor. About the time of the trial the report was made showing the record of income as indicated. On May 3, 1949, defendant Miller was informed by letter from plaintiffs' attorney that unless an adjustment was made "possibly a rescission would be proper in connection with the entire deal".

[3] While a contrary conclusion might reasonably be reached, the evidence sustains the finding of the trial court which in effect recites that the representations as to the income from the hotel at the time of and prior to the sale here involved, were false and untrue; that such representations were known by defendants to be false at the time they were made, and that plaintiffs did act to rescind within a reasonable time after learning of the truth of such facts. Gould v. Escondido Valley Poultry Ass'n, 56 Cal.App.2d 681, 133 P.2d 448.

Since there was one material misrepresentation justifiably relied on by the plaintiffs, it would ordinarily not be necessary to discuss other claimed misrepresentations. Hefferan v. Freebairn, 34 Cal.2d 715, 721, 214 P.2d 386; 12 Cal.Jur. p. 741, sec. 23. Nevertheless, since defendants claim that the evidence shows such a material change in conditions, as to the property and management before and after the sale, we will consider the remaining claims.

[4] As to finding (b) there is evidence that defendant bought the hotel property with the representation that all the sur-

rounding property, with but one exception, was restricted against other businesses in competition with the activities carried on by the hotel company; that in fact Miller sold certain lots near that property with the understanding that they were not so restricted; that massage work and a physiotherapy machine was being operated near the massage rooms and baths maintained by the plaintiffs. The question as to the time when plaintiffs obtained knowledge of the fact that certain lots were unrestricted, is problematical. Plaintiffs testified they first discovered it as to one lot at an early date, and that as to other lots, only a few months before trial. The finding of the trial court as to this paragraph is supported by the evidence.

[5] As to finding (c), there is evidence that when plaintiffs were first shown the swimming pool it was full of water and had signs on it: "For Fire Only" and "No Swimming". However, several witnesses testified that defendants told plaintiffs that there was an existing permit for the operation of the swimming pool; that workmen were working on the water line, and that defendants had to do certain other things first, but that the pool would be open the next Sunday and for plaintiffs to bring their bathing suits and go swimming. It was not ready the next Sunday or thereafter. About July 6, 1948, after the purchase, plaintiffs testified they inquired at the County Health Department and were informed that no permit had been issued; that only a conditional one was granted by letter dated in 1946, which required various structural changes in the pool (at an estimated cost in excess of $2,000) as well as the employment of a full-time life guard. Plaintiffs had hoped partially to finance this expedition with a portion of the loan obtained from defendant Miller in June, 1948, but found it was not economical, and that subsequently they learned that sufficient water could not be obtained to supply the pool from the springs or from the water company, since the pool had to be emptied at least once each week to comply with the requirements of the Health Department. The evidence supports the court's finding as to this claimed misrepresentation.

[6] As to finding (d), in regard to the water supply from the mineral springs, plaintiffs testified generally in accordance with the facts, as found by the court. The evidence is clear that there was a shortage of water from the mineral springs in the summer of 1948, and it was necessary to turn in water from the Shady Brook Water Company to obtain a sufficient supply for the hotel properties. It is apparent that plaintiffs did not regard this particular water shortage at that time as serious because of the use of water from the water company. There was also a shortage of water for a short time during September, 1947, at which time plaintiffs were using water from the water company and not from the mineral springs. In 1947, Lobdells blamed the shortage of water from the springs to leakage in the pipes, and accordingly purchased about 600 feet of new pipe before opening the baths. In June, 1948, more pipe "went wrong", and they connected temporarily with the water company lines. Plaintiffs talked with Miller about the trouble. Miller promised to furnish 300 feet of pipe to plaintiffs, but never produced. In August, 1948, plaintiff accosted defendant Miller while Miller was taking a treatment at the resort, and told him he was not obtaining sufficient water for the baths, etc. He told Miller: "You said there was lots of water here * * * I don't believe that you ever had any water up there", and Miller assured him that they "did have" and that there "shouldn't be anything wrong". He also complained about Tommy's Cafe operating on restricted property, and Miller said he could and would close it up immediately. Apparently this was not done. It appears that during the winter months there was no failure of the supply of water from the springs. During the summer months of 1950, there was not sufficient water from the springs to supply the hotel property, and admittedly there was never, during the summer months, a sufficient supply of water for the purposes represented from any source. The evidence shows that these

defendants were or should have been familiar with these facts. There was considerable evidence produced by the defendants which might well indicate that these plaintiffs made some partial independent investigation as to the water supply and as to some of the other claimed misrepresentations, and did in fact offer the premises for sale during this questioned period. Defendants stress the fact that plaintiffs obtained concessions from defendant Miller in the fall of 1948, and obtained an agreement that they could pay their interest only, and that the principal payments would be waived until 1949, as bearing upon the claim that there was a waiver of the claimed fraud and ratification of the transaction, and that plaintiffs should now be estopped from rescinding. We will not set forth the conflicting evidence pertaining to this subject. Buob v. Feenaughty Machinery Co., 191 Wash. 477, 71 P.2d 559, cited in Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935, holds that it would not be reasonable to suppose that a waiver resulted from an extension of time for payments on the buyer's notes. See, also, 5 Williston on Contracts (Rev.Ed.1937) sec. 1524, p. 4268. And in Hefferan v. Freebairn, 34 Cal.2d 715, 722, 214 P.2d 386, it is said that the making of two payments on a note after notice of rescission did not necessarily constitute a waiver. The ultimate finding of the trial court in this respect must be sustained.

[7–10] Numerous visits to the property prior to purchase do not absolutely preclude reliance on false representations made by the seller. Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances a prudent man would not be put upon inquiry, the mere fact that means of knowledge are open to plaintiff and he has not availed himself of them does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission. Denson v. Pressey, 13 Cal.App.2d 472, 57 P.2d 522. Where one conducts an investigation, he may still be entitled to rely upon certain representations concerning conditions as to which the investigation does not extend. Fuhrman v. American National B. & L. Ass'n, 126 Cal.App. 202, 213, 14 P.2d 601. The evidence does not here conclusively show that the plaintiffs *completely* relied on their own investigation. The questions of the weight of the evidence on the subject and the credibility of the witnesses were for the trial court to determine. Shearer v. Cooper, 21 Cal.2d 695, 134 P.2d 764.

The question of laches and unreasonable delay in rescinding was raised in Williams v. Marshall, 37 Cal.2d 445, 235 P.2d 372. It is stated, in 37 Cal.2d at page 445, 235 P.2d at page 378:

> "The courts have frequently declared that there is no artificial rule as to the lapse of time which will justify the application of the doctrine of laches. Each case must be determined upon the basis of its facts, and in the absence of a palpable abuse of discretion the trial court's finding upon the issue will not be disturbed upon appeal."

See, also, Blackman v. Howes, 82 Cal.App.2d 275, 278, 185 P.2d 1019, 174 A.L.R. 1004; Bagdasarian v. Gragnon, supra, 31 Cal.2d at page 748, 192 P.2d 935; Taber v. Bailey, 22 Cal.App. 617, 623, 135 P. 975; Anderson v. Thacher, 76 Cal.App.2d 50, 70, 172 P.2d 533; Mazuran v. Stefanich, 95 Cal.App. 327, 334, 272 P. 772.

[11] Ratification of a fraudulent transaction can only occur when the person ratifying has full knowledge of the facts. McNulty v. Copp, 91 Cal.App.2d 484, 205 P.2d 438; Holcomb v. Long Beach Inv. Co., 129 Cal.App. 285, 292, 19 P.2d 31; Mirich v. Underwriters at Lloyd's London, 64 Cal.App.2d 522, 530, 149 P.2d 19.

[12] It is also argued in this connection by defendants that since plaintiffs must have had knowledge of some of the claimed false representations prior to rescission, and accordingly waived any right to rescission thereon, such fact would put plaintiffs on notice in regard to the other claimed false representations and it would be incumbent upon them to make full investigation promptly; that notice of facts and circumstances which would put a man of

ordinary prudence and intelligence upon inquiry is in the eyes of the law equivalent to knowledge of all the facts a reasonable diligent inquiry would disclose, citing Ruhl v. Mott, 120 Cal. 668, 677, 53 P. 304, supra. A somewhat similar contention was made in Shearer v. Cooper, supra. There it was held that a purchaser of realty who has actual knowledge of the seller's misstatement in at least one material representation is not thereby precluded from relying on the other representations where the seller takes steps to rectify the error. It is not conclusively shown in the instant case that the purchaser had actual knowledge of any misrepresentation made by the defendants prior to the transaction agreed upon. The mere fact that plaintiffs may have become suspicious that one or more of the many claimed representations were false would not necessarily preclude a recovery upon the other claimed false representations. Shearer v. Cooper, supra; Blackman v. Howes, 82 Cal.App.2d 275, 280, 185 P.2d 1019, 174 A.L.R. 1004.

[13, 14] The fact that the purchasers inspected the premises before buying the property is not always conclusive that they did not rely upon the false representations of the seller. There are many exceptions to the general rule stated in Carpenter v. Hamilton, 18 Cal.App.2d 69, 75, 62 P.2d 1397, to the effect that in fraud cases, where the buyer is aware of suspicious circumstances or has learned of the falsity of one or more of the representations, he is under a legal duty to make a complete investigation, and may not rely on the statements of the seller. They are (1) That the buyer is not required to employ experts to investigate matters of a technical nature of which the seller has full knowledge and the buyer has none, and if for this reason the investigation is incomplete he may show that he relied on representations as to matters which he did not investigate. (2) That a buyer is not chargeable with knowledge of conditions which he fails to discover because of some artifice or deception of the seller. For other exceptions see Palladine v. Imperial Valley Farm Lands Ass'n, 65 Cal.App. 727, 225 P. 291; Tatterson v. Kehrlein, 88 Cal.App. 34, 263 P. 285; Sullivan v. Helbing, 66 Cal.App. 478, 226 P. 803; Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958; Ferguson v. Koch, 204 Cal. 342, 268 P. 342, 58 A.L.R. 1176; Kalkruth v. Resort Properties, Ltd., 57 Cal.App.2d 146, 134 P.2d 513; 12 Cal.Jur. p. 758, sec. 34, et seq.; and 6 Cal.Jur. Ten Year Supp. p. 80, sec. 35a; and Hefferan v. Freebairn, 34 Cal.2d 715, 720, 214 P.2d 386.

[15] Considering plaintiffs' testimony, the discovery of the fraud, if any, was made months after the agreement had been signed and after the refinancing program was completed. The rule stated in Gratz v. Schuler, 25 Cal.App. 117, 142 P. 899; and Carpenter v. Hamilton, supra, relied upon by defendants, is therefore not necessarily applicable. Discovery of the fraud and deceit after the consummation of the transaction and after the party defrauded has been prejudiced, cannot defeat the right to recover. Rhea v. Surryhne, 39 Cal. 579; 12 Cal.Jur. p. 761, sec. 35.

[16] The only question then arising is whether, after discovery, plaintiffs acted diligently in claiming a right to rescission. This question was thoroughly considered in Williams v. Marshall, supra, which also was before this court for consideration, 223 P.2d 644, and the court there upheld the trial court's action in finding that a fifteen-month delay by purchasers in serving a notice of rescission was excusable and did not constitute an abuse of discretion entitling the sellers to a reversal where, among other things, the parties continued to negotiate from discovery of the falsity of the representations until service of the notice; that in the absence of an abuse of discretion the court's finding on the issue of laches will not be disturbed; that a vendee who has been defrauded by his vendor is entitled to a reasonable time to investigate the falsity of the representations, and the time so consumed cannot be charged as unreasonable delay.

It cannot here be said that there was an abuse of discretion by the trial court in finding that plaintiffs were not guilty of laches in serving notice of rescission and in finding that there was no unreasonable delay. In view of the conflict in evidence rule. the portion of the judgment entered upon the findings ordering a rescission must be affirmed.

A more serious question presents itself in reference to the second contention, i. e., that the damages allowed were not supported by the evidence or the law, and that a wrong measure of damages was applied.

The portion of the judgment awarding plaintiffs $37,772.90, was arrived at in the findings as follows:

Plaintiffs paid down to defendant Miller, cash	$ 5,000.00
Plaintiffs paid down to defendant Miller, by transfer of real property—agreed value	10,000.00
Plaintiffs' payments on indebtedness, both principal and interest	6,726.90
Plaintiffs' total operating losses from July of 1947, to June 30, 1950, including charges for depreciation and rental value of plaintiffs' personal occupancy	16,523.00
Plaintiffs' actual improvement expenditures, both real and personal property	26,605.00
Total	$64,854.00

From this the court made deductions as follows:

Personal property acquired in transaction by plaintiffs and sold	$ 325.00
Parcel of real property acquired in transaction by plaintiffs, sales price applied on indebtedness	2,000.00
Parcel of real property acquired in transaction by plaintiffs and sold	700.00
Amount of depreciation charged by plaintiffs for real and personal properties	8,000.00
Reasonable rental value during plaintiffs' occupancy and use	7,000.00
Contribution by defendant Miller during refinancing of June, 1948, toward purchase of refurnishings and improvements	9,057.00
	$27,082.00

Recapitulation

Plaintiffs' total debits	$64,854.90
Plaintiffs' total credits	27,082.00
Leaving a balance due plaintiffs of	$37,772.90

Defendants argue that the judgment gives to plaintiffs a rescission, and also by way of damages, everything they were "out of pocket"; that both rescission and damages are not authorized, nor is the "out of pocket loss", provided for in section 3343 of the Civil Code, a true measure of damages where rescission is also obtained; that rescission implies the restoration of the parties to the same situation in which they were *when the contract in question was made*; that the effect of the judgment in this case is to force defendants to purchase from plaintiffs several thousands of dollars worth of second-hand furniture, linens and other personal property for which they have no use or desire; that such ruling does not place defendants back in their original position; that all items expended by plaintiffs for personal property were expended after the transaction on July 2, 1949, and such purchases were no part of said transaction; that plaintiffs were strictly volunteers as to such purchases of personal property and defendants are not obligated to reimburse them for such amounts; and that the judgment should be reduced accordingly, citing Solorza v. Park Water Company, 86 Cal.App.2d 653, 195 P.2d 523; Hancock v. Williams, 99 Cal.App.2d 80, 82, 221 P.2d 129; Bank of America v. Greenhach, 98 Cal.App.2d 220, 240, 219 P.2d 814; that plaintiffs may have been entitled to receive credit for monies they expended on permanent improvements, taxes, etc., but were not entitled to be fully reimbursed for noney spent purchasing personal property and making temporary improvements on the real property or expenses in caring for the property, citing Newman v. Smith, 77 Cal. 22, 27, 18 P. 791; that these items are included in the sum of $26,605 (less the $9,057 contribution) or $17,548, allowed as an item of recovery to plaintiffs; that the court should have used the true value of $9,500 instead of $10,000 "agreed value" of the real property, which property was accepted by defendants as part of the down payment for the hotel property; and that accordingly the judgment against defendants should have been reduced in the sum of $500. These are the major items about which defendants complain.

[17] The remedy of rescission necessarily involves a repudiation of the contract. The remedy afforded by an action for the recovery of damages suffered by reason of fraud, under section 3343 of the Civil Code, involves an affirmance of the contract. The measure of damages recoverable in an action for rescission is essentially different from that in a simple action for damages caused by fraud. In the rescission action a plaintiff is entitled to recover the consideration he gave on restoration or offer of restoration of that which he received. He is also entitled to recover compensation for whatever consequential damages he may have suffered by reason of having entered into the contract. In the latter case, a plaintiff is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received together with additional damage arising from the particular transaction. Carter v. Carr, 139 Cal. App. 15, 27, 33 P.2d 852. This question was fully discussed in Bank of America v. Greenbach, supra, and it was there said, in 98 Cal.App.2d at page 240, 219 P.2d at page 828:

> "Greenbach argues that § 3343 of the Civil Code controls the measure of damages in a rescission action. That section provides * * *. The section concludes with this language: 'Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.' Thus, the section is limited to actions for damages for fraud and deceit, and specifically excludes 'equitable' remedies, one of which is the remedy of rescission", citing Bagdasarian v. Gragnon, 31 Cal.2d 744, 763, 192 P.2d 935; and Hefferan v. Freebairn, 34 Cal.2d 715, 214 P.2d 386.

The record does not show that the trial court, in fixing the amount of recovery, used the measure of damages provided for in section 3343 of the Civil Code.

[18] Where it is possible to bring about substantial justice by adjusting the equities between the parties, the fact that the *status quo* cannot be exactly reproduced will not preclude the plaintiffs from equitable relief. No matter what may be the complications or complexities, the powers of a court of equity are so broad as to adequately meet the exigencies of the case and render a decree which will justly determine the rights of the respective parties. Arthur v. Graham, 64 Cal.App. 608, 612, 222 P. 371. In Kent v. Clark, 20 Cal.2d 779, 785, 128 P.2d 868, 872, 142 A.L.R. 576, the court held that under this rule a rescission might be ordered and a judgment rendered for the "value of any improvements which the vendee has placed upon the land". In Stewart v. Crowley, 213 Cal. 694, 701, 3 P.2d 562, 565, it was said that "in such actions the court may grant any monetary relief necessary to do complete equity between the parties". In Shermaster v. California Home Building etc., Co., 40 Cal. App. 661, 667, 181 P. 409, a judgment for the value of improvements placed on the property, such as a well, pump, and small house, exclusive of any sum due defendant from plaintiff for use and occupation of the land and premises, was allowed. It was there held that the *cost* of the improvements was some evidence of its value.

In Michaelian v. Elba Land Co., 76 Cal. App. 541, 554, 245 P. 476, the court allowed a recovery of the money paid on the purchase price and cost of improvements and deducted the rental value of the land while plaintiff was in possession. For other reimbursements ordered see, Vice v. Thacker, 30 Cal.2d 84, 180 P.2d 4; 4 Cal.Jur. p. 798, sec. 29, and cases cited.

The only question here to determine is whether the parties have been placed as nearly as possible in *status quo* and whether the amount allowed for a recovery was proper under the circumstances and was reasonable and equitable.

[19] As to the item of $500, being the difference in agreed value of the real property deeded to defendants as part of the purchase price and the actual value thereof as contended by defendants, the court, under its equitable powers, had the right to fix the agreed value as the amount for which defendants should account. Swan v. Talbot, 152 Cal. 142, 94 P. 238, 17 L.R.A., N.S., 1066; Thompson v. Stoakes, 46 Cal. App.2d 285, 293, 115 P.2d 830; Lasher v. Faw, 209 Cal. 726, 735, 289 P. 821.

[20–23] As to the item of $17,548, defendants complain because the findings fail to distinguish between the amount spent on improving the real property, which they admit might be properly charged, and the amount spent by plaintiffs for personal property purchased by them for which defendants claim plaintiffs are not entitled to be reimbursed because such purchases, particularly the furniture and furnishings, were voluntary on plaintiffs' part; that since title thereto was at all times vested in plaintiffs, defendants should not be forced to accept them and to reimburse plaintiffs for their cost price. There might be some merit to this last argument had it not been for the facts surrounding the furnishing of the furniture and fixtures and the sale of the old furniture, with the apparent acquiescence and approval of the Millers. The evidence shows that the old furnishings were quite dilapidated and that before much could be done with the property, attracting guests and securing an income therefrom, some improvements were necessary. The extent of those improvements which should have been made might be questioned. After the sale, Miller took a trip to Alaska and plaintiffs proceeded with the improvements. In May or June, 1948, plaintiffs went to defendants' home after his return, and disclosed their financial condition and told Miller that they owed considerable money on the furniture and other bills; that they wanted to pay it off and use the balance which they figured would be around $2,000, in opening the swimming pool. Apparently Miller approved a plan to loan them $9,057 and took back a new trust deed and chattel mortgage on the new furniture and on the real property, totaling $29,000. He then told them what the monthly payments would be. It appears that defendant Miller discussed with plaintiffs, prior to the sale, plaintiffs' intentions to completely remodel and refurnish the hotel. Defendants observed the remodeling and refurnishing being carried on and they knew of, or at least indicated that they ratified, the actions of plaintiffs in selling the old furniture and in purchasing the new furniture, by accepting a chattel mortgage on it, which mortgage listed the furnishings in detail. These expenditures were found by the trial court to be consequential damages suffered by reason of the fraud found to be committed by defendants. Although the evidence produced by plaintiffs on the subject is set forth more or less by lump sum and is not segregated to any particular extent as to detail, the total sum found due is supported by the evidence. Defendants produced no definite evidence to contradict the figures suggested by plaintiffs. Although it cannot be said, as a matter of law, that the award is excessive, it does appear, to say the least, that plaintiffs do not stand to lose anything by the transaction; and that the evidence might well have justified a lower amount of damages than that found by the trial court. However, we find ourselves bound by the familiar rule, well known to the profession, that an appellate court possesses none of the functions of the trial court in passing upon the weight of the evidence, and cannot assume to exercise them. The question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding may be presented to an appellate court for review, but its duty stops when it has determined that there is some substantial evidence to support it. It will not weigh the evidence, pass upon the credibility of witnesses, nor substitute its judgment thereon for that of the trial court, but will uphold the findings even though it would have decided otherwise if it had occupied the place of the trial judge. 2 Cal. Jur. p. 912, sec. 539.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

114 Cal.App.2d Supp. 841

PEOPLE v. AGNEW.

No. Cr. A. 2892.

Appellate Department, Superior Court,
Los Angeles County, California.
Nov. 17, 1952.

Prosecution for agreeing to perform a lewd act for money, and for being a lewd person. The Municipal Court, Los Angeles Judicial District, LeRoy Dawson and Kenneth L. Holaday, Judges, entered judgment of conviction, and denied defendant's motion for new trial, and defendant appealed. The Superior Court, County of Los Angeles, Appellate Department, Bishop, J., held that 17 year old defendant, who was allegedly without funds to employ counsel and who repeatedly requested counsel and was denied same, had been deprived of due process of law.

Judgment reversed and order denying new trial reversed.

1. Constitutional Law 🔑268
Criminal Law 🔑641(1)

Where 17 year old defendant who was charged with misdemeanors and who was allegedly without funds to employ counsel, repeatedly requested court to appoint counsel for her, failure of trial court to see that defendant was represented by counsel was a denial of due process, and a violation of provision of State Constitution that in criminal prosecutions party accused shall have right to appear and defend in person and with counsel. U.S.C.A.Const. Amend. 14; Const. art. 1, § 13.

2. Constitutional Law 🔑257

Due process clause is applicable in prosecution for misdemeanor. U.S.C.A. Const. Amend. 14.

3. Criminal Law 🔑251

Provision of State Constitution that in criminal prosecutions, in any court whatever, the party accused shall have the right to appear and defend, in person and with counsel, applies to a person brought before a police court on a misdemeanor charge. Const. art. 1, § 13.

4. Attorney and Client 🔑63

The relation of attorney and client is the same when a public defender appears for one accused of crime as it is when defendant is represented by privately employed counsel.

5. Criminal Law 🔑641(2)

In prosecution for misdemeanor, where defendant was represented by deputy public defender when originally arraigned for plea, the relation of attorney and client had been entered into, and proceedings following arraignment should not have been undertaken in absence of counsel without inquiry as to reason for his absence or withdrawal from case.

6. Criminal Law 🔑 641(3)

If deputy public defender, who represented 17 year old defendant charged with misdemeanor and allegedly financially unable to secure counsel of her own, withdrew from case for good cause, it was duty of trial court to appoint counsel to represent defendant. Business and Professions Code, § 6068(h).

7. Criminal Law 🔑641(1)

Where 17 year old defendant, who was charged with misdemeanor was represented at original arraignment by deputy public defender, and deputy public defender failed to appear on her behalf after original arraignment, and at time for plea defendant filed her own demurrer, filing of demurrer did not constitute a waiver of defendant's right to be represented by counsel.

8. Criminal Law ⚿1086(11)

Where refusal of court to appoint counsel in misdemeanor prosecution was specifically made ground for appeal, and it clearly appeared that, after one or two appearances by public defender, no counsel appeared on defendant's behalf, and that defendant had repeatedly requested counsel, if there was any circumstance that excused failure of trial court to provide counsel, that circumstance should have been made to appear in record.

9. Criminal Law ⚿641(1)

In misdemeanor prosecution, where husband of defendant was threatened with contempt proceedings if he assisted defendant during procedural steps of case, and at trial was permitted to sit with defendant as investigator, but expressly admonished not to advise defendant as to her legal rights, husband did not provide legal assistance, to which she was entitled.

◆

Rosemary Agnew, in pro per.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

BISHOP, Judge.

Because the defendant was brought to trial without the aid of counsel, although she repeatedly requested that counsel be afforded her, we are reversing the judgment sentencing her to imprisonment on each of two counts, and are reversing the order denying the defendant a new trial.

The record before us reveals these facts: The defendant was charged with agreeing to perform a lewd act for money, and with being a lewd person. When arraigned for her plea on January 18, she was represented by counsel, a deputy public defender. Time to plead was requested and granted. Upon the date fixed for her plea, the defendant appeared, and, the minutes of the court state, she was again represented by the deputy public defender who had first appeared as her counsel. It seems rather clear, however, from affidavits filed later in support of a motion for relief, that that deputy did not attend the hearing and that the deputy who did attend did not appear on defendant's behalf. In any event, she filed a demurrer "respectfully submitted" in her own name. The hearing on the demurrer was continued to January 25, at which time, defendant unquestionably appearing without counsel, it was overruled.

A motion for relief was then filed, its first request being the appointment of counsel. This request was denied February 13, and a like request on February 15 was also denied. Defendant's trial commenced in the morning of March 6, she having waived a jury "because my husband told me so." At the opening of the afternoon session the defendant stated that she was seventeen years of age—a fact that appears without refutation in several affidavits also—without funds to employ an attorney, and she desired the court to appoint counsel for her. The motion was denied without inquiry or comment.

The case was one where the need of skilled counsel was glaringly apparent. The defendant over and over betrayed, by what she said and did, her bewilderment at what was going on. The testimony of the police officers was in direct conflict with the essential parts of her somewhat incoherent statements as a witness, and, had a foundation been laid while he was on the stand, the main witness for the People could have been impeached at a vital point by the testimony he had given less than three months earlier at a juvenile court hearing. In making this statement, we are assuming, as we may, that defendant's husband would have testified, if called as a witness, to the same facts that he swore to in an affidavit filed in support of defendant's motion for a new trial. A layman, even one mature enough and sufficiently equipped, mentally, to conduct his defense under ordinary conditions, could not be expected to know that, if he desired to impeach a witness by showing that he had made contrary statements on other occasions, he must lay the foundation for the impeaching evidence while the witness is on the stand. Too many counsel show themselves ignorant of this requirement for us to concede that it is one that a layman should be expected to know.

[1] We have, then, a case where the failure of the trial court to see to it that the defendant was represented by counsel was a denial of the due process required by the Fourteenth Amendment. It is not every denial, in a state court, of the appointment of counsel, that results in a denial of due process. Betts v. Brady, 1941, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. But, we read in Palmer v. Ashe, 1951, 342 U.S. 134, 72 S.Ct. 191, 192, 96 L.Ed. —: "This Court repeatedly has held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in non-capital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense." Such a case was Wade v. Mayo, 1947, 334 U.S. 672, 684, 68 S.Ct. 1270, 1276, 92 L.Ed. 1647, 1654, where it was stated: "There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment." (As already indicated, the incapacity of the defendant in our case was patently present.) See also Uveges v. Pennsylvania, 1948, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127.

[2] It is true, as counsel for the People contend, that none of the cited cases deals with misdemeanors. This, however, does not serve to distinguish them, for the requirement of the Fourteenth Amendment, that no person shall be deprived of liberty or property without due process, applies equally where the deprivation occurs by means of a prosecution on a misdemeanor charge. See In re McCoy, 1948, 32 Cal.2d 73, 76, 194 P.2d 531, 532, and Tumey v. Ohio, 1927, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.

[3] The defendant's right to have the assistance of counsel in making her defense has, in addition to the Fourteenth Amendment to the Federal Constitution, the protection of section 13, Article I of our state constitution. Its provision that "In criminal prosecutions, in any court whatever, the party accused shall have the right * * to appear and defend, in person and with counsel", applies to a person brought before a police court on a misdemeanor charge, In re Jingles, 1946, 27 Cal.2d 496, 498, 165 P.2d 12, 14, and so to the defendant in this case.

[4-6] It will be remembered that when the defendant was originally arraigned for her plea, she was represented by counsel. The circumstance that her counsel was a deputy public defender is not one of significance to the constitutional question we are considering. The source of his compensation is different, but otherwise the relation of attorney and client is the same when a public defender appears for one accused of crime as would be the relation between privately employed counsel and client. In re Hough, 1944, 24 Cal.2d 522, 528-529, 150 P.2d 448, 451; People v. O'Neill, 1947, 78 Cal.App.2d 888, 891, 179 P.2d 10, 12; People v. Avilez, 1948, 86 Cal.App.2d 289, 296, 194 P.2d 829, 834. That relationship having been entered into, proceedings following the original arraignment should not have been undertaken in the absence of defendant's counsel without inquiry as to the reason for his absence or his withdrawal from the case, for some good reason. If such good reason is found in the fact that the defendant was released on bail, a fact not affirmatively appearing but made probable by the minute entry that a bail bond had been posted, then it became the duty of the trial court, upon the withdrawal of the public defender, to give the defendant an opportunity to secure counsel or, if, as she stated, she was financially unable to secure her own, to provide her with one. The time honored method has been to appoint a member of the bar, who, under obligation "Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed", Subd.(h), sec. 6068, Business and Professions Code, may have to act without compensation. Rowe v. Yuba County, 1860, 17 Cal. 61; Lamont v. Solano County, 1874, 49 Cal. 158, and see discussion in Gibson v. County of Sacramento,

1918, 37 Cal.App. 523, 529, 174 P. 935. The more modern method is to provide public defenders, and by ordinance such legal assistance is afforded the needy in Los Angeles city. The trial court, however, took no step to ascertain whether or not the defendant could obtain counsel or why the counsel that she had was not present, and failed to act favorably upon several pleas that counsel be provided, made both before the case was sent out for trial and afterward. In this it erred.

[7] The defendant cannot be said to have waived the right to counsel. At the beginning, she had counsel. If, as seems established, he failed to appear on her behalf after the original arraignment, and the defendant appeared for herself by filing the lengthy demurrer prepared for her (by her husband, no doubt), that appearance did not, in her case, constitute a waiver of her right to be represented by counsel. As stated both in People v. Chesser, 1947, 29 Cal.2d 815, 821, 178 P.2d 761, 764, and in Johnson v. Zerbst, 1937, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1467, the "purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." Moreover, if by her inadvertent action she had waived the right to have counsel when her demurrer was ruled upon, immediately thereafter she made a motion that counsel be appointed, and this and subsequent motions were denied, apparently summarily.

[8] Anticipating the contention that error should not be presumed, and that we have no transcript or narration in the statement on appeal revealing the showing made to the trial court of defendant's need of the court's assistance, we call attention to the fact that the matter we have been discussing was specifically made one of the grounds of the appeal. It also clearly appears that after one (or possibly two) appearances by the public defender no counsel appeared on defendant's behalf, and she repeatedly expressed the need for one. If there was any circumstance that excused the failure of the trial court to provide her with counsel, that circumstance should have been made to appear in the record in some fashion, and it does not. Again quoting from Johnson v. Zerbst, supra, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461, 1467: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel." After referring to these words, our Supreme Court, in People v. Chesser, supra, 29 Cal.2d 815, 822, 178 P.2d 761, 764, quoted further, with emphasis added: *"While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropiate for that determination to appear upon* the *record."*

[9] There is a suggestion in the brief of the People, and the thought may have been in the minds of the trial judges, that the defendant was receiving all the legal assistance to which she was entitled from her husband, who, though not admitted to the bar, has been before the bar of justice in this state on so many occasions that he has picked up more than a little legal learning. We do not doubt that he wrote the briefs the defendant has submitted in this case, and they are well written. The suggestion, however, is quite unworthy of consideration as a contention, for it appears by way of undenied affidavits that defendant's husband was threatened with contempt proceedings if he assisted her during some procedural steps in the case, and at the trial was permitted to sit with her as her "investigator," but expressly admonished not to advise as to her legal rights "nor as to what course you should take in the conduction of this trial." Without debating the propriety of a declaration that a husband may not advise a wife, who is appearing in propria persona, as to her course of action, it is of course obvious that when so restrained he may not be said to so meet her needs for legal assistance that she is not prejudiced by her lack of counsel.

We entertain no doubt that the judgment should be reversed. It and the order denying the defendant a new trial are reversed. The appeals from all other matters are dismissed.

SHAW, P. J., and STEPHENS, J., concur.

114 Cal.App.2d Supp. 853

GILIO et al. v. CAMPBELL.

Appeal No. 5.

Appellate Department, Superior Court,
Fresno County, California.

Nov. 24, 1952.

Defendant moved to set aside entry of default and judgment based thereon, which plaintiff had secured. The Municipal Court granted the motion and the plaintiffs appealed. The Superior Court in and for the County of Fresno, Appellate Department, George M. DeWolf, J., held that under the circumstances the defendant was not entitled to relief on ground of mistake or excusable neglect.

Order reversed with direction.

1. Judgment 🔑**143(3)**

The granting or denial of motion to vacate default and judgment based thereon on ground of mistake, inadvertence, surprise or excusable neglect, rests in sound discretion of trial court. Code Civ.Proc. § 473.

2. Appeal and Error 🔑**957(2)**

Order granting or denying motion to vacate default and judgment based thereon on ground of mistake, inadvertence, surprise or excusable neglect, will not be disturbed on appeal unless it clearly appears that trial court abused discretion. Code Civ.Proc. § 473.

3. Appeal and Error 🔑**935(2), 948**

On appeal from the granting or denial of motion to vacate default and judgment based thereon on ground of mistake, inadvertence, surprise or excusable neglect, all presumptions will be indulged in favor of correctness of order, and appellant has burden to show that discretion of trial court was abused. Code Civ.Proc. § 473.

4. Judgment 🔑**139**

In passing on motion to vacate default, the trial court exercises a sound and legal discretion, which is guided and controlled in its exercise by fixed principles. Code Civ.Proc. § 473.

5. Judgment 🔑**143(3)**

Mistake, as ground for setting aside default, may be either mistake of fact or mistake of law, and "mistake of fact" exists when a person understands the facts to be other than they are, and "mistake of law" exists when a person knows the facts as they really are but has a mistaken belief as to legal consequences of those facts. Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Mistake of Fact" and "Mistake of Law".

6. Judgment 🔑**143(6)**

Where mere reading of summons served on defendant would have informed him that if he did not appear and answer complaint within ten days a judgment could be taken against him, and defendant did not claim that he was unaware of contents of summons and complaint, there was no "mistake of fact" within rule permitting setting aside default judgment for "mistake of fact". Code Civ.Proc. § 473.

7. Judgment 🔑**143(6)**

Defendant's failure to read summons does not excuse defendant's default. Code Civ.Proc. § 473.

8. Judgment 🔑**143(16)**

Defendant's asserted lack of knowledge that plaintiff could take a judgment against him and defendant's asserted belief that he thought he would be called into court before judgment could be taken against him did not constitute "mistake of law" within rule permitting setting aside default judgment for "mistake of law", where summons served on defendant plainly advised defendant to appear in court if he wanted to contest the case. Code Civ.Proc. § 473.

9. Judgment ⚷143(16)

Defendant's total ignorance of the law, when coupled with defendant's grossly negligent conduct, does not justify relief from default judgment. Code Civ. Proc. § 473.

10. Judgment ⚷143(3)

"Excusable neglect" within statute authorizing court to relieve party from judgment taken against him through his "excusable neglect" is that neglect which might have been the act of a reasonably prudent person under same circumstances. Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Excusable Neglect".

11. Judgment ⚷138(2)

Where constable, at time of service of summons and complaint, warned defendant to take care of the matter before it went too far, and later told defendant a judgment had been taken against him, and plaintiff's attorney told defendant to see a lawyer, but defendant did nothing until he was served with order to appear in court to answer on supplementary proceedings, defendant's conduct was that of a grossly negligent person and not that of a reasonably prudent person, and hence defendant was not entitled to relief from his default on ground of excusable neglect. Code Civ.Proc. § 473.

12. Judgment ⚷138(1)

Change of mind is not ground for vacating default judgment. Code Civ.Proc. § 473.

◆

John D. Chinello and Laurence E. Viau, Fresno, for appellant.

George Roth, Fresno, for respondent.

DE WOLF, Judge.

The Municipal Court granted a motion made under Section 473 of the Code of Civil Procedure, by the defendant, in that Court, to set aside an entry of a default and a judgment based thereon, which plaintiff secured on May 9th, 1952. This is an appeal from that order.

Summarizing the facts of the case, we find that the defendant was personally served with a copy of the summons and complaint on April 25th, 1952; that the Constable serving the papers on the defendant, at the time of the service, advised the defendant to take care of the matter before it went too far, to which the defendant replied that he would take care of it the next day; that 14 days later, on May 9th, 1952, the plaintiff secured the entry of defendant's default and a judgment based thereon against the defendant; that on June 9th, 1952, 31 days after plaintiff secured the default judgment, the Constable who had originally served the copy of the summons and complaint on the defendant told the defendant that a judgment had been taken against him, and that the Court had issued a writ of execution; that on June 11th, 1952, the defendant consulted plaintiff's attorney and was told by the attorney that if he (the defendant) planned to resist the satisfaction of the judgment he should procure counsel; that on July 9th, 1952, an order requiring defendant to appear in Court to answer on supplementary proceedings was served on the defendant, and that on July 10th, 1952, 76 days after the service of summons, the defendant consulted an attorney in reference to the order requiring him to appear for examination.

On July 14th, 1952, defendant moved the trial court to vacate the entry of the default and to set aside the judgment.

At the hearing on this motion, the defendant testified, so far as is pertinent to this appeal, that he was not familiar with the law; that he had no knowledge that plaintiff could get a judgment against him; that he thought he would be called into court before a judgment could be taken against him; that he was a labor contractor; that he was very busy; that although he did not owe the money to plaintiff, he was afraid of being "blackballed" (presumably among the labor camps, although the record is silent on this subject) if he didn't pay off; that he was advised by plaintiff's attorney that if he wanted to resist paying the judgment he should consult an attorney; that he did not consult an attorney until the day after he was served with an order to appear in court to be examined on supplementary proceedings; that he at first felt that his reputation as a labor contractor would be injured if he resisted the suit, but that later, after talking to other men and thinking it over, he thought: "Why should I be afraid? It is going to keep on anyway."

On this appeal, we are asked to decide—was the trial judge guilty of an abuse of discretion in granting defendant's motion to vacate the default and set aside the judgment?

[1–3] In Baratti v. Baratti, 109 Cal. App.2d 917 at page 921, 242 P.2d 22, at page 24, the Appellate Court has stated the basis on which an appeal on this question should be considered, as follows:

> "The granting or denial of a motion to vacate a default and a judgment based thereon on the ground of mistake, inadvertence, surprise or excusable neglect, rests in the sound discretion of the trial court; and the order will not be disturbed on appeal unless it clearly appears that the trial court was guilty of an abuse of discretion. All presumptions will be indulged in favor of the correctness of the order, and the burden is on the appellant to show that the court's discretion was abused."

[4] As a further guide post in indicating standards by which such a motion should be tested, the Superior Court, in Waite v. Southern Pacific Company, 192 Cal. 467 at page 470, 221 P. 204, at page 206, stated:

> "At all times the trial court is to exercise a sound and legal discretion in passing upon an application for relief against such a judgment. This discretion, however, is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles. 'It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of * * * justice.'"

From a study of this case, it appears that defendant seeks to justify the order of the trial court on the grounds of mistake or excusable neglect. We find nothing indicating a claim of inadvertence or surprise.

[5] "Mistake", as a ground for setting aside a default, may be either a mistake of fact or a mistake of law. Douglass v. Todd, 96 Cal. 655, 31 P. 623. A mistake of fact exists when a person understands the facts to be other than they are; a mistake of law exists when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. Baratti v. Baratti, supra.

[6, 7] We are unable to discover any basis for believing that the defendant was laboring under any mistake of fact. A mere reading of the summons served on the defendant would have informed him that if he did not appear and answer the complaint within 10 days, a judgment could be taken against him. It is to be noted that the defendant does not claim that he was unaware of the contents of the summons and complaint. In any event, a failure to read the summons would furnish defendant no excuse. Garner v. Erlanger, 86 Cal. 60, 62, 24 P. 805.

[8, 9] Nor do we find anything to support the conclusion that the defendant is entitled to any relief because of a mistake of law. The testimony of defendant, to the effect that he had no knowledge that the plaintiff could take a judgment against him, and that he thought he would be called into court before a judgment could be taken against him, appears to be the only evidence remotely supporting the theory of a mistake of law. It is difficult to discover how the defendant could have such an idea, particularly when the summons plainly told him that if he did nothing for 10 days plaintiff could take a judgment against him. That same summons also plainly advised defendant to appear

in court if he wanted to contest the case. These facts, together with defendant's admission that he was not familiar with the law, do not indicate a misconception of the law, but rather a total ignorance of the law. Such ignorance of the law, when coupled with defendant's grossly negligent conduct, which will be subsequently discussed, will not justify relief. 14 Cal. Jur., page 1036; Chase v. Swain, 9 Cal. 130, 136.

[10, 11] Passing to the question of "excusable neglect", that term has been held to mean that neglect which might have been the act of a reasonably prudent person under the same circumstances. Elms v. Elms, 72 Cal.App.2d 508, 512, 164 P.2d 936. Considering the facts of this case, we cannot say that the defendant acted as a reasonably prudent man. The Constable, at the time of service, warned defendant to take care of the matter before it went too far, and later told the defendant a judgment had been taken against him. Plaintiff's attorney told him to see a lawyer. But the defendant did nothing until he was served with the order to appear in court to be examined. This is the conduct of a grossly negligent person, and to such a person no relief should be extended. Elms v. Elms, supra.

[12] In the testimony of the defendant concerning his fear of having his reputation injured, and of his later change of mind in this respect, we find nothing supporting any theory on which relief could be granted. A change of mind is not a ground for vacating a judgment. Elms v. Elms, supra.

For the reasons set forth, the order of the trial court is therefore reversed, and said court is ordered to reinstate the default of the defendant and the judgment based thereon.

SHEPARD, P. J., and CONLEY, J., concur.

40 Cal.2d 33

In re CARAVAS' ESTATE.

BRANDENBURGER v. STATE.

Sac. 6166.

Supreme Court of California, in Bank.

Dec. 2, 1952.

Probate proceeding involving property to which nonresident alien had succeeded and which had been distributed to the state. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment denying the claim on ground that it was barred by the five year statute of limitation, and petitioner appealed. The Supreme Court, Traynor, J., held, inter alia, that the statute of limitation was tolled during the period the alien had been denied access to the courts because of war.

Reversed.

Prior opinion, 247 P.2d 35.

1. Aliens ⚿12(4)

When nonresident alien succeeds to property, title vests in him at death of decedent subject to control of probate court and to possession of personal representative for purposes of administration. Probate Code, §§ 300, 1026.

2. Aliens ⚿12(4)
Escheat ⚿3

Where nonresident alien succeeds to property, his right thereto becomes absolute upon appearance and demand within five years of succession, but such right is barred and the property is disposed of as escheated property if alien fails to so appear and demand the property. Probate Code, §§ 300, 1026.

3. Aliens ⚿12(4)

A demand by nonresident alien for property to which he has succeeded and which is in possession of state treasurer must be made in Superior Court of Sacramento County in same manner that claim would be made for other assets held by state treasurer pursuant to statute relating to distribution of estates. Probate Code, §§ 300, 1026, 1027.

4. War and National Defense ⚿12

Nonresident alien living in Greece under German occupation during World War II was prohibited by Trading With the Enemy Act from maintaining action in state court for property to which such alien had succeeded and which had been distributed to the state. Probate Code, § 1026; Trading With the Enemy Act, §§ 2, 3, 7, 50 U.S.C.A.Appendix, §§ 2, 3, 7.

5. Limitation of Actions ⚿113

Resident of Greece at time of German occupation during World War II was under a "disability" and a "statutory prohibition" within statutes tolling statutes of limitation, in view of fact that Trading With the Enemy Act prevented such resident from filing claim to property to which she had succeeded and which had been distributed to the state, and such time would not be used in determining five year period within which such resident was required to make demand for such property. Code Civ.Proc. §§ 354, 356; Probate Code, § 1026; Trading With the Enemy Act, §§ 2, 3, 7, 50 U.S.C.A.Appendix, §§ 2, 3, 7.

See publication Words and Phrases, for other judicial constructions and definitions of "Disability" and "Statutory Prohibition".

6. Escheat ⚿6

Where claim is filed in Superior Court of Sacramento County for property in possession of state treasurer under statute providing for distribution of deceased's estate to the state, the applicable procedure is that outlined in sections of Code of Civil Procedure relating to claims to property which is held by or which has escheated to the state. Code Civ.Proc. §§ 1272, 1272a; Probate Code, §§ 1026, 1027.

7. Limitation of Actions ⚿131

Act of filing claim in Superior Court of Sacramento County for property to which claimant has succeeded and of which state treasurer has possession under distribution statute is the "commencement of an action" within statutes providing for tolling of statutes of limitation. Code Civ.Proc. §§ 354, 356; Probate Code, §§ 1026, 1027.

See publication Words and Phrases, for other judicial constructions and definitions of "Commencement of an Action".

8. Limitation of Actions ⚿113

Under international and municipal law, a statute of limitation is tolled during period when existence of state of war prevents access to courts, whether particular statute of limitation expressly provides for such suspension thereof.

9. Limitation of Actions ⚿104½

Statute of limitation is based on assumption that one with good cause of action will not delay bringing it for an unreasonable period of time, but when plaintiff has been denied access to courts, basis of assumption is destroyed.

10. Limitation of Actions ⚿113

Five year statute of limitation within which period nonresident alien was required to make demand for property to which she had succeeded and which had been distributed to the state would be tolled during time alien was denied access to courts because of war, even if such limitation were substantive, rather than procedural. Code Civ.Proc. §§ 354, 356, 363, 1272, 1272a; Probate Code, §§ 1026, 1027; Trading With the Enemy Act, §§ 2, 3, 7, 50 U.S.C.A.Appendix, §§ 2, 3, 7.

11. Limitation of Actions ⚿104½

Where operation of statute of limitation is suspended for given length of time, effect is to add equal period to the statutory period. Code Civ.Proc. §§ 354, 356; Probate Code, §§ 1026, 1027.

◆

Brandenburger & White and William A. White, Sacramento, for appellant.

Harold I. Baynton, Asst. Atty. Gen., Frank J. Hennessy, U. S. Atty., San Francisco, George B. Searls and Joseph Laufer, Attorneys, Department of Justice, Washington, D. C. and Myron D. Alexander, Sp. Asst. to Atty. Gen., amici curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., and William J. Power, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Gerasimos Caravas died intestate in San Francisco on September 30, 1941, and his estate was probated in the Superior Court of the City and County of San Francisco. No heirs appeared to claim the estate and on September 15, 1942, the court entered its decree ordering distribution of the estate to the state treasurer pursuant to section 1027 of the Probate Code. In fact, however, Gerasimos was survived by his mother, Foteini Caravas, a resident and citizen of Greece and his sole heir under section 225 of the Probate Code. Foteini died in Greece in 1944. On August 25, 1947, petitioner, administrator of Foteini's estate, filed a petition in the Superior Court of Sacramento County praying that the state treasurer be ordered to pay to petitioner the funds of the estate, amounting to $1,936.18. In explanation of the delay in filing the claim petitioner alleged, and the trial court found, that Greece was occupied by German military forces from April 7, 1941, to November 30, 1944, and that during this period it was impossible to file a claim for the funds held by the state treasurer. The trial court also found that the reciprocity necessary under section 259 of the Probate Code existed. The court, however, entered judgment denying the claim, on the ground that it was barred by section 1026 of the Probate Code, providing: "A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property." Petitioner appeals from the judgment, contending that his claim was timely made on the ground that the period of German occupation of Greece should not have been included in the computation of the five year period prescribed by section 1026.

[1-3] When a nonresident alien succeeds to property, title vests in him at the death of the decedent, In re Estate of Romaris, 191 Cal. 740, 744, 218 P. 421, subject to the control of the probate court and to the possession of the personal representative for purposes of administration. Probate Code, § 300. If the nonresident alien should "appear and demand" the property within five years of his succession thereto, his right to the property is absolute; if he fails to meet that requirement, his right to the property is barred and the property is disposed of as escheated property. Ly-

ons v. State of California, 67 Cal. 380, 384, 7 P. 763; In re Estate of Meyer, 107 Cal. App.2d 799, 804, 238 P.2d 597. Section 1026 does not expressly provide how the alien must make his "demand," but the applicable procedure is found in other statutes. Under section 1027 of the Probate Code, estate assets not distributed by the final decree to known heirs, devisees, or legatees entitled thereto, are distributed to the State of California and are held by the state treasurer. Thus, if as in the present case an alien has not made a "demand" under section 1026 at the time of the decree of distribution, the state treasurer takes possession of the property. When property is held under section 1027, claimants must appear and claim the estate or any part thereof in the Superior Court of Sacramento County. If the claim is not filed within the statutory period, it "shall be forever barred, and such property, or so much thereof as is not claimed shall vest absolutely in the State." Section 1027 further provides that "Rights of nonresident aliens shall be governed by the provisions of Section 1026". Since the sentence of section 1027 preceding the quoted reference to section 1026, provides that the five year period under section 1027 commences from the date of the decree making distribution to the state treasurer, the purpose of the reference to section 1026 is to call attention to the fact that when nonresident aliens succeed to the property, the five year period is computed from the "time of succession" rather than from the date of distribution. When sections 1026 and 1027 are read together, it is clear that after the state treasurer takes possession of assets of an estate pursuant to section 1027, a "demand" by a nonresident alien under section 1026 must be made in the Superior Court of Sacramento County in the same manner that a "claim" would be made for other assets held by the state treasurer under section 1027, and that, after the distribution to the state treasurer, the only difference between the two classes of property is that in the case of a nonresident alien the five year period for making the claim is computed in a different manner. The Attorney General contends that a "demand" under section 1026 may be made without any court action by the nonresident alien, even after the property has been distributed to the state treasurer, relying upon a dictum in State v. Smith, 70 Cal. 153, 156, 12 P. 121. In that case, however, the court was not concerned with express statutory language that after distribution to the state treasurer a claim to the property could be made only in the Superior Court of Sacramento County.

The determinative question on this appeal is whether the five year period set forth in section 1026 should be extended because of the disability suffered by petitioner.

[4] In the present case the nonresident alien was a citizen and resident of Greece during the period when the United States was at war with Germany. As a resident of an enemy-occupied country she came within the provisions of section two of the Trading With the Enemy Act. 50 U.S.C.A. Appendix, § 2; Drewry v. Onassis, 266 App.Div. 292, 42 N.Y.S.2d 74, 78, affirmed without opinion 291 N.Y. 779, 53 N.E.2d 243; The Rita Maersk, D.C., 52 F.Supp. 56, 59, affirmed U. S. v. Grain Importers, 1 Cir., 144 F.2d 921; Compagnie Francaise de L'Afrique Occidentale v. The Otho, D. C., 57 F.Supp. 829, 148 A.L.R. 1423. She was thus unable to maintain a proceeding in a California court for the recovery of her property. Trading With the Enemy Act, § 7, 50 U.S.C.A.Appendix, § 7; Ex parte Colonna, 314 U.S. 510, 511, 62 S.Ct. 373, 86 L.Ed. 379; Meier v. Schmidt, 150 Neb. 647, 648, 35 N.W.2d 500, 137 A.L.R. 1355. Moreover, section 3 of the Trading With the Enemy Act, 50 U.S.C.A.Appendix, § 3, prohibited residents of Greece from communicating with anyone in this country "except in the regular course of the mail" and during the German occupation mail service with Greece was suspended. Postal Bulletin No. 18344, Nov. 28, 1941; Postal Bulletin No. 18773, Nov. 21, 1944. It thus was impossible for Foteini Caravas or her heirs in Greece to communicate with persons in this country, or to file an action in a California court if communication could be had.

[5-7] Petitioner contends that proceedings under sections 1026 and 1027 are subject to sections 354[1] and 356[2] of the Code of Civil Procedure. This contention must be sustained. A "disability" under section 354 and a "statutory prohibition" under section 356 are both present since the Trading With the Enemy Act prevented petitioner from filing a claim to the property. The word "action" in sections 354 and 356 includes a "special proceeding of a civil nature." Code Civ.Proc. § 363. When a claim is filed in the Superior Court of Sacramento County pursuant to sections 1026 and 1027, the applicable procedure is that outlined in section 1272 and 1272a of the Code of Civil Procedure, Ebert v. State of California, 33 Cal.2d 502, 509, 202 P.2d 1022; see amendment to section 1027 by Stats.1951, ch. 1459, § 1, and those sections are in Part III of the Code of Civil Procedure, entitled "Special Proceedings of a Civil Nature". It is thus clear that the act of filing a claim in the Superior Court of Sacramento County under sections 1026 and 1027 is the "commencement of an action" within sections 354 and 356. Taketa v. State Board of Equalization, 104 Cal. App.2d 455, 459, 231 P.2d 873 [mandate to set aside order revoking liquor license]; People v. Grant, 52 Cal.App.2d 794, 800, 127 P.2d 19 [proceeding under section 325 of Penal Code to forfeit money taken from slot machines]; Wells v. California Tomato Juice, Inc., 47 Cal.App.2d 634, 637, 118 P.2d 916 [proceeding to enforce mechanic's lien].

[8, 9] Moreover, although sections 1026, 1027, 1272 and 1272a do not expressly refer to suspension of the limitation period when war has prevented access to the Superior Court of Sacramento County to file a claim, it is an established principle of international and municipal law that a statute of limitation is tolled during the period when the existence of a state of war prevents access to the courts, whether or not the particular statute of limitation expressly provides for such suspension thereof. Kolundjija v. Hanna Ore Mining Co., 155 Minn. 176, 179, 193 N.W. 163; Wirtele v. Grand Lodge, A. O. U. W., 111 Neb. 302, 305, 196 N.W. 510; Siplyak v. Davis, 276 Pa. 49, 52, 119 A. 745; Inland Steel Co. v. Jelenovic, 84 Ind.App. 373, 376, 150 N.E. 391; 54 C.J.S., Limitations of Actions, § 259; 137 A.L.R. 1454. "All statutes of limitations are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time; but, when a plaintiff has been denied access to the courts, the basis of the assumption becomes destroyed." Frabutt v. New York, Chicago & St. Louis R. Co., D.C., 84 F.Supp. 460, 466. A typical case is Hanger v. Abbott, 6 Wall., U.S., 532, 18 L.Ed. 939. There, shortly after the Civil War a resident of New Hampshire brought an action in the federal court in Arkansas against a resident of Arkansas. The debt sued upon had been contracted before the war and the defendant pleaded the statute of limitations. The court held that since the courts of Arkansas were closed to a citizen of New Hampshire during the war, the statute of limitation was suspended for that period. The court recognized that the applicable statute of limitation did not expressly refer to war disabilities but held that nevertheless it must be interpreted to include such exception. Again, in Peters v. McKay, Or., 238 P.2d 225, 246 P.2d 585, a case apposite to the present one, an Oregon statute provided that after property escheated to the state, it could be claimed within ten years thereof. The statute did not provide for extension of the ten year period if war prevented filing of a claim. Residents of The Netherlands filed a claim after expiration of the statutory period, alleging as an excuse for the delay that the occupation of

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[1] "When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of the continuance of such disability is not part of the period limited for the commencement of the action whether such cause of action shall have accrued prior to or during the period of such disability."

[2] "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

The Netherlands by Germany prevented timely compliance with the statute. The claimants' right was ultimately denied on grounds inapplicable here, but the Oregon court held that the period during which the claimants were denied access to the Oregon courts by reason of the war could not be included in the computation of the ten year period. The court stated: "When the state consents to be sued, and then by reason of its recognition of rules of international and common law, closes its courts to the litigant, thereby denying the privilege which it granted, some construction must be sought which will avoid absurdity. It is unbelieveable that the same hand which gives should also be construed to take away." 238 P.2d at page 236.

[10] The Attorney General contends that the foregoing cases should not be followed here, on the ground that section 1026 is a substantive statute of limitation and that at the expiration of five years the nonresident alien not only lost his remedy under sections 1272 and 1272a, but that in addition the right itself was extinguished under section 1026. As previously pointed out, under section 1026 title vests in a nonresident alien at the death of the decedent, subject to the condition that he must "appear and demand" the property within five years to prevent loss of his title. If he does not so appear his right to the property is lost; if he does appear his right is preserved. Thus, at least after a decree of distribution to the state has been entered under section 1027, the right of a nonresident alien is dependent upon the commencement of a legal proceeding within the five year period, just as the recovery of an ordinary party plaintiff may be dependent upon the commencement of appropriate legal proceedings within the time specified by a statute of limitation. A contention similar to that made here by the Attorney General was rejected in State of Maryland to Use of Burkhardt v. United States, 4 Cir., 165 F.2d 869, 873, 1 A.L.R.2d 213, where the court stated: "And we think it makes no difference that the limitation applicable to the action for death by wrongful act is held under state law to be a condition on the exercise of the right rather than a limitation on the remedy. This holding is based upon the narrow ground that the limitation is imposed by the statute creating the cause of action and is, to say the best of it, technical and legalistic reasoning, which is not followed in all the states." The same conclusion was reached in Osbourne v. United States, 2 Cir., 164 F.2d 767, 769, where a merchant seaman was unable to file an action within the time specified by a substantive statute of limitation because he was interned by the Japanese government and denied access to the courts during the time when the action should have been filed. Accord: Scarborough v. Atlantic Coast Line R. Co., 4 Cir., 178 F.2d 253, 259, 15 A.L.R.2d 491, certiorari denied 339 U.S. 919, 70 S.Ct. 621, 94 L.Ed. 1343; Siplyak v. Davis, supra, 276 Pa. 49, 58, 119 A. 745; see, also, Farrell v. County of Placer, 23 Cal.2d 624, 630, 145 P.2d 570, 153 A.L.R. 323. Clearly, whether a particular statute of limitation is viewed as substantive or procedural, the consequences of a failure to commence legal proceedings within the specified time are the same insofar as the claimant is concerned and, accordingly, the same considerations that lead to the conclusion that a procedural statute is tolled by the fact that the claimant is denied access to the courts similarly lead to the conclusion that the time specified in a substantive statute of limitation must likewise be extended.

[11] For the foregoing reasons, we have concluded that the trial court erroneously included the period between September 15, 1942, the date of distribution to the state, and November 30, 1944, the date of termination of German occupation of Greece, in its computation of the five year period specified in section 1026. It is unnecessary to determine whether, as contended by petitioner, the period between the death of Gerasimos and the decree of distribution, or any part thereof, should also have been excluded. The periods between the death of decedent, September 30, 1941, and the decree of distribution, September 15, 1942, and between the date that occupation ended, November 30, 1944, and the date that the claim was filed, August 25, 1947, total less than five years. When

the operation of a statute of limitation is suspended for a given length of time, the effect is to add an equal period to the statutory period, Graybar Electric Co. v. Lovinger, 81 Cal.App.2d 936, 938, 185 P.2d 370, and, under the views expressed herein, petitioner thus filed a claim within the five year period prescribed by section 1026.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

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39 Cal.2d 858

DE BURGH v. DE BURGH.

L. A. 21986.

Supreme Court of California, In Bank.

Nov. 25, 1952.

Divorce proceeding by wife on ground of extreme cruelty. Husband cross-complained for divorce on same ground. The Superior Court, Los Angeles County, Julius V. Patrosso, J., found each party guilty of cruelty and denied each a divorce, and wife appealed. The Supreme Court, Traynor, J., held that husband's cruelty was not provoked by wife and that evidence did not establish defense of recrimination on part of husband.

Judgment reversed.

Prior opinion 240 P.2d 625.

Shenk, J., dissented in part.

1. Appeal and Error ⇨110

An order denying motion for new trial is not appealable.

2. Divorce ⇨150(2)

In divorce proceeding, finding that cruelty of each party was provoked by the other party was inconsistent with conclusion that recrimination was established. Civ.Code, §§ 111, 122.

3. Divorce ⇨46, 53

Cruelty that is provoked does not give rise to a cause of action for divorce, but cause of action for divorce must be shown to establish recrimination, and, therefore, provocation and recrimination are not complementary, but are mutually exclusive defenses. Civ.Code, §§ 111, 122.

4. Divorce ⇨46

To justify extreme cruelty by one spouse under the doctrine of provocation, the other spouse's misconduct must itself be a serious violation of marital obligations.

5. Divorce ⇨46

Wife's alleged accusations made two or three days before separation that husband was dishonest and a homosexual could not constitute provocation of the alleged physical brutality and other misconduct of husband which took place from date of marriage until the separation of the parties. Civ.Code, §§ 111, 122.

6. Divorce ⇨12

Public policy does not discourage divorce where relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.

7. Divorce ⇨53

Under statute providing that divorces must be denied upon showing by defendant of any cause of action against plaintiff, in bar of plaintiff's cause of divorce, fault of plaintiff in divorce litigation should have no more significance than elsewhere in the law, and the trial judge has duty to determine whether fault of plaintiff in a divorce action is to be regarded as "in bar" of plaintiff's cause of divorce based upon defendant's fault. Civ.Code, §§ 111, 122.

8. Divorce ⇨55

A court of equity is authorized to enter a judgment dismissing an action of divorce where both parties are seeking a decree and the evidence discloses them to be equally guilty of the misconduct alleged. Civ.Code, §§ 111, 122.

9. Divorce ⇨53

The doctrine of recrimination is a part of the doctrine of unclean hands and is neither puristic nor mechanical but is an equitable principle to be applied according to the circumstances of each case and with a proper respect for the paramount interests of the community at large.

10. Divorce 🔑124

In divorce proceeding, evidence was not sufficient to establish recrimination. Civ.Code, §§ 92, 111, 122, 139, 146, 161a, 172, 172a, 1689, subd. 2.

11. Divorce 🔑54

No precise formula exists for determining when cause of divorce shown against plaintiff is to be considered a bar to his action for divorce since the divorce court, as a court of equity, is clothed with a broad discretion to advance the requirements of justice in each particular case, but the court should consider prospect of reconciliation, the effect of the marital conflict upon the parties and third parties, and the comparative guilt of the parties.

12. Divorce 🔑12

If a continuation of the marriage would constitute a serious hazard to health of either party, as in case of physical brutality, the court should be reluctant to deny a divorce.

13. Divorce 🔑12

Financial considerations can play only a minor role in determining propriety of a divorce, but these considerations may not be entirely ignored if the evidence indicates that the marital conflicts are destroying parties' livelihood.

14. Trial 🔑391

It is essential that findings be made upon every material issue raised by the pleadings.

15. Divorce 🔑53

In divorce action, issue whether cause of action proved against each spouse is to be regarded as in bar of cause of action proved against the other spouse is a material issue and must be expressly decided by the trial court before divorce can be denied on grounds of recrimination.

16. Divorce 🔑221, 252

Where divorce is granted to both parties, alimony may be awarded to either, but the community property must be equally divided. Civ.Code, §§ 139, 146.

Max Fink, Jerry Rolston, Cyrus Levinthal and Leon E. Kent, Los Angeles, for appellant.

Donald Armstrong, Torrance, for respondent.

TRAYNOR, Justice.

[1] Plaintiff Daisy M. DeBurgh and defendant Albert Raymond DeBurgh were married in California in October, 1946. They separated in February, 1949, and in the same year plaintiff brought this action for divorce on the ground of extreme cruelty. Defendant filed a cross-complaint for divorce, also on the ground of extreme cruelty. The allegations of cruelty were denied in the answers filed by each party. The trial court found "that each of the parties to this action has been guilty of acts of cruelty towards the other, and that such acts of cruelty by each toward the other, were provoked by the acts of the other." The court decided that "each party has been guilty of recrimination and neither is entitled to a divorce from the other." The court entered judgment that plaintiff take nothing by her complaint and that defendant take nothing by his cross-complaint. Plaintiff appeals "from the judgment signed and entered by the court" and from the order denying her motion for a new trial. Since the latter order is nonappealable, the appeal therefrom must be dismissed.

The evidence regarding cruelty is in conflict; it supports the finding that each party has been cruel to the other. Plaintiff's evidence tended to show that defendant was frequently intoxicated to excess, that he inflicted physical injury upon plaintiff on several occasions, that he boasted of his relations with other women, that he unreasonably criticized plaintiff's daughter, that he unjustly berated plaintiff concerning a former suitor, and that, although he was a lavish spender in other ways, he was penurious with plaintiff. Defendant's evidence indicated that plaintiff had unjustly accused him of dishonesty and homosexuality and had communicated to his business associate similar false and malicious statements.

Since the trial court found that defendant was guilty of acts of cruelty towards plaintiff, it is clear that the judgment denying plaintiff a divorce is not on the ground that plaintiff failed to prove the allegations of cruelty in her complaint. The judgment thus must be based either on the finding that defendant's cruelty was provoked by plaintiff or on the ground that defendant established the defense of recrimination.

[2-5] The finding that the cruelty of each party was provoked by the other party is inconsistent with the conclusion that recrimination was established. Cruelty that is provoked does not give rise to a cause of action. Truax v. Truax, 62 Cal.App.2d 441, 444, 145 P.2d 88; Popescu v. Popescu, 46 Cal.App.2d 44, 49, 115 P.2d 208. To establish recrimination, however, a cause of divorce must be shown. Civil Code, § 122; Mayo v. Mayo, 3 Cal.2d 51, 56, 43 P.2d 535; Smith v. Smith, 119 Cal. 183, 189–190, 48 P. 730, 51 P. 183; Haskill v. Haskill, 56 Cal.App.2d 204, 208, 132 P.2d 294. Provocation and recrimination, therefore, are not complementary, but mutually exclusive, defenses. To justify extreme cruelty by one spouse under the doctrine of provocation, the misconduct of the other spouse must itself be a serious violation of marital obligations. See Eidenmuller v. Eidenmuller, 37 Cal. 364, 364–365; Popescu v. Popescu, supra, 46 Cal.App.2d 44, 50, 115 P.2d 208. The record in the present case fails to disclose any such violation on plaintiff's part that would justify the physical brutality and other misconduct of defendant. Defendant's acts of cruelty, as set forth in plaintiff's evidence, took place from the date of marriage until the separation of the parties, whereas defendant freely conceded at the trial that his allegations of plaintiff's cruelty were based solely upon plaintiff's accusations that he was dishonest and a homosexual, charges that were made no earlier than two or three days before the separation. Thus, although the evidence would support the finding that defendant's cruelty provoked the false accusations made by plaintiff, there is no evidence of any earlier misconduct by plaintiff that would justify defendant's cruelty. Under these circumstances, the decision of the trial court cannot be supported upon the theory of provocation rather than recrimination.

The determinative question on this appeal, therefore, is whether the findings and conclusions in this case warrant application of the doctrine of recrimination. It is apparent from the remarks of the trial judge at the close of the trial that he believed that the transgressions of each party necessarily precluded the granting of a divorce to either. On the other hand, the language of section 122 of the Civil Code indicates that the trial court may have abused its discretion in disregarding the requirement therein that the cause of divorce of which one party is found guilty must be "in bar" of that party's ground of divorce against the other party. To resolve this conflict, we have studied the history of the doctrine of recrimination, its objectives, and the wording and legislative background of the applicable statutes.

It has sometimes been assumed that any cause of divorce constitutes a recriminatory defense. The legislative language, however, is ill-adapted to such a broad purpose. Read together, Sections 111 and 122 of the Civil Code provide: "Divorces must be denied upon * * * a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." Had the Legislature meant to make every cause of divorce an absolute defense, it could easily have provided that: "Divorces must be denied upon * * * a showing by the defendant of any cause of divorce against the plaintiff." We are bound to consider the additional requirement that such a cause of divorce must be "in bar" of the plaintiff's cause of divorce.

Much of the confusion concerning recrimination in California has proceeded from the erroneous discussion of the subject in Conant v. Conant, 10 Cal. 249, which was decided before recrimination became a part of the statutory law. It was stated in that case that this defense is based on the doctrine that one who violates a contract containing mutual and dependent covenants cannot complain of its breach by the other party. Logically, such a theory would permit the party against whom the first marital offense was committed to ignore thereafter the duties imposed by the marriage "contract," for in contract law a material breach excuses further performance by the innocent party. Restatement of Contracts, § 274; Cal.Civ.Code, § 1689(2). In fact, however, the defense may be asserted without regard to whether the plaintiff or the defendant was the first at fault. Pullen v. Pullen & Holding, 123 L.T.R. 203, 36 T.L. R. 506.

[6] The deceptive analogy to contract law ignores the basic fact that marriage is a great deal more than a contract. It can be terminated only with the consent of the state. In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage. But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. "[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed." Hill v. Hill, 23 Cal.2d 82, 93, 142 P.2d 417, 422; Weil v. Weil, 37 Cal.2d 770, 783–784, 236 P. 2d 159; see also Saltzgaver v. Saltzgaver, 182 Md. 624, 636–637, 35 A.2d 810; opinion of Bickley, J., in Chavez v. Chavez, 39 N.M. 480, 489, 50 P.2d 264, 101 A.L.R. 635.

The chief vice of the rule enunciated in the Conant case is its failure to recognize that the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty. The disruption of family relationships, the clandestine associations with third parties, and the oppressive effect upon children and the community are intensified. It is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment.

Moreover, the historical discussion of the doctrine of recrimination in the Conant case is inaccurate. The court relied mainly on the decisions of the eminent English ecclesiastical jurist, Lord Stowell. It is significant that in his later utterances Lord Stowell viewed with regret the illogical and pernicious consequences of a mechanical application of the doctrine.[1] Even the medieval canon law, upon which Lord Stowell relied, did not carry recrimination to the extreme of the Conant case; although permitted as a bar when the plaintiff sought a divorce for adultery, this defense was not accepted against a cause of divorce based on cruelty, for the church lawyers realized that public policy was not served by forcing a wife, even if guilty, to return to a home where her life was in danger. Sanchez, De Sancto Matrimonii Sacramento, Lib. X, Disp. 18, No. 5, cited by Neuner, Modern Divorce Law, 28 Iowa L.Rev. 272, 279, n. 21. See also opinion of Lord Stowell in Chambers v. Chambers, 1 Hag.Con. 439, 452, 161 Eng.Rep. 610, 614.

In any event ecclesiastical authorities are not relevant in view of the fact that ecclesiastical courts could not grant absolute divorce. They could decree only limited divorce, equivalent to a judicially recognized separation. Such a court's action was usually limited to a determination of certain property rights of the parties or the husband's duty of support.[2] It is not surprising, therefore, that ecclesiastical lawyers placed more emphasis upon the comparative guilt of the parties than Parliament did in cases of absolute divorce. Parliament appears to have tempered the doctrine of recrimination with discretion. On the question of recrimination in cases of absolute divorce, the Conant opinion, necessarily looking for its authority to Parliamentary practice, relied exclusively upon Simmons' Case, 12 C. & F. 339, 8 Eng.Rep. 1438, in which Parliament denied a divorce,[3] overlooking other cases involving recrimination where Parliament allowed divorce. See, for example, Major Campbell's Case, 42 H. of L. Jour. 141, reprinted in MacQueen, A Practical Treatise on the Appellate Jurisdiction of the House of Lords [1842], p. 590. Only a year before the Conant decision, in fact, Parliament had created jurisdiction in the English courts to grant absolute divorce and in so doing expressly provided for judicial discretion on the issue of recrimination. Divorce and Matrimonial Causes Act of 1857, 20 & 21 Vict., c. 85, § 31.

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[1] "I cannot blind myself to the fact, that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the Canon Law had anticipated in connection with its rule. There is no return to cohabitation, nor are there any means to be resorted to for the purpose of compelling it. In the state of separation, whether authorized or merely conventional, which usually takes place, there is certainly the increased danger of a spurious offspring; and as the regulation of property exists among us, the danger of separate debts, to the great eventual injury of the husband and his legitimate family." (Proctor v. Proctor, 2 Hag. Con. 292, 302, 161 Eng.Rep. 747, 751.)

[7] The California Legislature, in enacting the Civil Code in 1872, did not follow the principles of the Conant case. The Code provisions on recrimination made two important departures from the existing law.

First, the Code requires that the defendant prove a cause of divorce against the plaintiff to establish this defense. The requirement of the Conant case that plaintiff be "without reproach" no longer prevails. Mayo v. Mayo, 3 Cal.2d 51, 56, 43 P.2d 535; Smith v. Smith, 119 Cal. 183, 189–190, 48 P. 730, 51 P. 183; White v. White, 82 Cal. 427, 452, 23 P. 276, 7 L.R.A. 799; Haskill v. Haskill, 56 Cal.App.2d 204, 208, 132 P.2d 294; Popescu v. Popescu, 46 Cal.App.2d 44, 49, 115 P.2d 208; Hilton v. Hilton, 54 Cal.App. 142, 149, 201 P. 337; Klemmer v. Klemmer, 42 Cal.App. 618, 622, 187 P. 85. The dictum to the contrary in Shapiro v. Shapiro, 127 Cal.App. 20, 24, 14 P.2d 1058, is without support even in the textbook authority cited and is clearly opposed to the statute.

Second, as shown by the notes of the Commissioners who drafted the Code, the Legislature rejected the strict rule of recrimination of the ecclesiastical courts. Significantly, neither the Conant case nor any other divorce cases appear among the precedents listed by the Commissioners as the basis of the statute. It is apparent from the decisions that were listed that the Legislature intended that divorce cases involving recrimination be governed by the same principles that apply generally throughout our jurisprudence. Although the plaintiff's fault has always been regarded as an important element in the decision of any case, our courts have traditionally refused to exalt that element above the public interest. Thus, in Freeman v. Sedgwick, 6 Gill., Md., 28, 40, a fraudulent conveyance case cited by the Commissioners, Mr. Justice Story's Equity Jurisprudence is quoted as follows: "Relief is not granted, where both parties are truly *in pari delicto*, unless in cases where public policy would thereby be promoted." Vol. I, p. 317, § 298; see also 14th ed. [1918], vol. I, pp. 395–398, § 421. This respect for the public interest has formed the basis of a recognized exception to the equitable doctrine of unclean hands, with which the defense of recrimination has become increasingly identified since the enactment of the Code. It is clear that the Legislature, in relying upon judicial principles of general application, intended that in divorce litigation the fault of the plaintiff should have no more significance than elsewhere in the law. Apparently with this purpose in mind it worded the statute to require that a cause of divorce shown by defendant must be "in bar" of the plaintiff's cause of divorce. It would have defeated its own purpose had it closed the avenues to divorce when the legitimate objects of matrimony have been destroyed. The perpetuation of an unwholesome relationship would be a mockery of marriage.

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[2] Even in this area, the ecclesiastical law and common law were not in agreement. For a collection of cases, see Beamer, The Doctrine of Recrimination in Divorce Proceedings, 10 Univ. of Kansas City L. Rev. 213, 222–236.

[3] Strictly speaking, Simmons' Case did not turn upon recrimination. Adultery on the part of the plaintiff husband was alleged, but the House of Lords refused to decide whether or not that recriminatory defense had been proved. Instead, the divorce was denied on the ground that the husband had driven his wife and daughter into the streets and, in spite of ample means, had refused to support them; this conduct on his part directly led to the wife's becoming a street-walker and prostitute. In reality, therefore, Simmons' Case is to be viewed as an example of the doctrine of provocation. (Cf. Johnson v. Johnson, 14 Cal. 459, 460; Truax v. Truax, 62 Cal.App.2d 441, 444, 145 P.2d 88; Popescu v. Popescu, 46 Cal.App.2d 44, 49, 115 P.2d 208; Annen v. Annen, 79 Cal.App. 626, 627–628, 250 P. 580.

[8] The California cases decided since the enactment of the Civil Code contain little analysis or discussion of the principles governing the defense of recrimination. In Brenot v. Brenot, 102 Cal. 294, 296, 36 P. 672, this court correctly stated the rule to be that "a court of equity is *authorized* to enter a judgment dismissing an action of divorce, where both parties are seeking a decree, and the evidence discloses them to be equally guilty of the misconduct alleged." (Italics added.) Again, in Glass v. Glass, 4 Cal.App. 604, 607, 88 P. 734, the appellate court, in affirming the judgment with regard to property issues, observed without objection that the trial court had found both parties guilty of extreme cruelty but nevertheless had granted the plaintiff a divorce. In some cases, however, it has been assumed, apparently with the acquiescence of the parties themselves, that the mere showing of a cause of divorce against the plaintiff is sufficient. See Sweasey v. Sweasey, 126 Cal. 123, 129–130, 58 P. 456; Mattson v. Mattson, 181 Cal. 44, 47, 183 P. 443; Helpling v. Helpling, 50 Cal.App. 676, 680–681, 195 P. 715; Gough v. Gough, 101 Cal.App.2d 262, 268–269, 225 P.2d 668. This failure to exercise the discretion authorized by the statute has enabled the thinking engendered by the Conant case to survive by default. Important developments of the past several decades have made it increasingly clear that the courts can no longer decline to exercise the discretion inherent in the clean hands doctrine.

The rising divorce rate in the United States has compelled a growing recognition of marriage failure as a social problem and correspondingly less preoccupation with technical marital fault. This trend is strikingly exemplified by the recent amendment of Section 92 of the Civil Code designating incurable insanity as a ground for divorce. Formerly, no matter how vicious the conduct of an insane spouse, he could not be divorced, for the law refused to find in him the guilt essential to a marital offense. See Cohn v. Cohn, 85 Cal. 108, 109, 24 P. 659; Wray v. Wray, 19 Ala. 522, 525; Wright v. Wright, 125 Va. 526, 99 S.E. 515, 4 A.L.R. 1333; 42 A.L.R. 1531. The Legislature has come to realize, however, that when a union is dominated by insanity, fulfilment of the normal purposes of marriage is hopeless. What was once a bar to divorce is now recognized as a justification for divorce. Still more striking in recognition of this trend has been the enactment of legislation in many states authorizing divorce when the spouses have lived apart for a required number of years. Marriage failure, rather than the fault of the parties, is the basis upon which such divorces are granted. See George v. George, 56 Nev. 12, 17–18, 41 P.2d 1059, 97 A.L.R. 983; Lemp v. Lemp, 62 Nev. 91, 101–102, 141 P.2d 212, 148 A.L.R. 1104; Sitterson v. Sitterson, 191 N.C. 319, 131 S.E. 641, 51 A.L.R. 763; George v. George, 56 Nev. 12, 41 P. 1059, 97 A.L.R. 985; Knabe v. Berman, 234 Ala. 433, 175 So. 354, 111 A.L.R. 867; Young v. Young, 207 Ark. 36, 178 S.W.2d 994, 152 A.L.R. 336; Otis v. Bahan, 209 La. 1082, 26 So.2d 146, 166 A.L.R. 498. Cf. Pavletich v. Pavletich, 50 N.M. 224, 229–234, 174 P.2d 826.

It would be forward indeed for the court, when it is called upon to evaluate an alleged recriminatory defense, to ignore the growing awareness that a marriage in name only is not a marriage in any real sense. In other fields, equity does not deny relief on the ground of plaintiff's unclean hands when to do so would be harmful to the public interest. See Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 et seq., 64 S.Ct. 622, 88 L.Ed. 814; Leo Feist Inc. v. Young, 8 Cir., 138 F.2d 972, 974–976; Cleveland, C.,

C. & St. L. Ry. v. Hirsch, 6 Cir., 204 F. 849, 857–858; Menzel v. Niles Co., 86 Colo. 320, 325–326, 281 P. 364, 65 A.L.R. 995; Saylor v. Crooker, 97 Kan. 624, 627–628, 156 P. 737; Deutschmann v. Board of Appeals of Canton, 325 Mass. 297, 299, 90 N.E.2d 313; Cameron v. International Alliance, etc., 118 N.J.Eq. 11, 20–21, 176 A. 692, 97 A.L.R. 594; Cosden Oil & Gas Co. v. Hendrickson, 96 Okl. 206, 210, 221 P. 86; cf. Hobbs v. Boatright, 195 Mo. 693, 715, 720–724, 93 S.W. 934, 5 L.R.A.,N.S., 906. See also 1 Story on Equity [14th ed. 1918], § 421, pp. 396–398; Pomeroy on Equity [5th ed. 1941], § 941, pp. 733 et seq.; Chafee, Some Problems of Equity [1950], p. 95; Basket v. Moss, 115 N.C. 448, 20 S.E. 733, 48 L.R.A. 842; Fergus County v. Osweiler, 107 Mont. 466, 86 P.2d 410, 120 A.L.R. 1461; 13 C.J., Contracts, § 441, p. 497; 17 C.J.S., Contracts, § 278; 30 C.J.S., Equity, §§ 98a, 98b, pp. 487–491; 12 Am.Jur., Contracts, § 214, pp. 729–731. Such a rule is even more appropriate in marital litigation, where the social consequences of the court's decree are of the utmost importance. See Sullivan v. Sullivan, 219 Cal. 734, 736, 28 P.2d 914 [annulment]; Loughran v. Loughran, 292 U.S. 216, 228–230, 54 S.Ct. 684, 78 L.Ed. 615 [marital property rights].

It bears noting how frequently divorces are uncontested. In many cases neither spouse is "innocent," and yet by agreement, one of them defaults to ensure a divorce. Thus a strict recrimination rule fails in its purpose of denying relief to the guilty. Moreover, it exerts a corrupting influence on the negotiations that precede the entry of such a default. The spouse who more desperately seeks an end to a hopeless union is penalized by the ability of the other spouse to prevent a divorce through the assertion of a recriminatory defense, and the more unscrupulous partner may obtain substantial financial concessions as the price of remaining silent. Were the clean hands doctrine properly applied, it would encourage estranged couples to bring their differences before the chancellor, where the interests of society as a whole can be given proper recognition and where settlement negotiations can be supervised and unfair advantage prevented.

A mechanical application of the doctrine of recrimination is by no means universal. In some states, the defense has been limited by requiring that the plaintiff's offense be of the same type as the defendant's or that it involve equal guilt. See Bast v. Bast, 82 Ill. 584, 585; Appeltofft v. Appeltofft, 147 Md. 603, 605, 128 A. 273; Hokamp v. Hokamp, 32 Wash.2d 593, 596, 203 P.2d 357. Such limitations are not entirely satisfactory, however; even when misconduct is identical the court should be permitted to exercise a sound discretion in the public interest. Several states expressly recognize judicial discretion concerning recrimination. Vanderhuff v. Vanderhuff, 79 U.S. App.D.C. 153, 144 F.2d 509, 509–510; Stewart v. Stewart, 158 Fla. 326, 327–328, 29 So.2d 247, 170 A.L.R. 1073; Roberts v. Roberts, 103 Kan. 65, 72, 173 P. 537; Panther v. Panther, 147 Okl. 131, 134, 295 P. 219. See also Flagg v. Flagg, 192 Wash. 679, 686, 74 P.2d 189.

In view of the reliance of the Conant case on what was thought to be the English rule, perhaps the most illuminating of the modern cases on the subject is Blunt v. Blunt, [1943] A.C. 517, 169 L.T.R. 33, decided in the House of Lords in 1943. Significantly, the judges in England were for many years reluctant to exercise the discretion given them by the Act of 1857. Eventually, however, the courts fully accepted their responsibility, Wickens v. Wickens, [1918] P. 265, 119 L.T.R. 268; Wilson v. Wilson, [1920] P. 20, 122 L.T.R. 223, and, in Blunt v. Blunt, Lord Chancellor Simon reviews the factors that should govern the decision in a given case. Among these are the prospect of reconciliation and the interests of the children of the marriage. In keeping with the traditional view of the law toward both marriage and divorce, the Lord Chancellor states that the consideration of "primary importance" is the interest of the community at large. This interest is "to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down." [1943] A.C. at 525, 169 L.T.R. at 34; cf Hill v. Hill, **23**

Cal.2d 82, 93, 142 P.2d 417; Weil v. Weil, 37 Cal.2d 770, 783–784, 236 P.2d 159.

[9] In examining the doctrine of recrimination, we have given the most serious consideration not only to judicial precedent but also to the work of leading scholars and practitioners. Few rules of law have been more widely condemned by the legal profession. In 1948, a committee of experts of the American Bar Association joined with the representatives of other interested groups in the work of the National Conference on Family Life. The Bar Association's representatives, acting as the legal section of the conference, strongly recommended the elimination of the defense of recrimination. Report of Legal Section of National Conference on Family Life [1948], pp. 1, 3, 7. See also Chafee, Some Problems of Equity [1950], pp. 73 et seq. In view of the statutory provisions on the subject, we are not free to go so far. Moreover, we do not believe that the comparative guilt of the parties will be without significance in every case. We do believe, however, that some of the evils pointed out by the Bar Association Committee can be avoided within the framework of the existing statute if it is kept in mind that the doctrine of recrimination, like the doctrine of unclean hands of which it is a part, is neither puristic nor mechanical, but an equitable principle to be applied according to the circumstances of each case and with a proper respect for the paramount interests of the community at large.

Defendant relies upon Comfort v. Comfort, 17 Cal.2d 736, 745–752, 112 P.2d 259. The discussion of recrimination in that case, however, was directed entirely to the question whether or not the recriminatory defense there involved had become inoperative owing to lapse of time. The court did not consider the language of Section 122 of the Civil Code in the light of the clean hands doctrine, nor was that issue raised in the briefs of the parties. The Comfort case therefore does not support the proposition that the doctrine of recrimination precludes the exercise of equitable discretion.

To the extent that the following cases support a mechanical application of the doctrine of recrimination, they are disapproved: Sweasey v. Sweasey, 126 Cal. 123, 129–130, 58 P. 456; Mattson v. Mattson, 181 Cal. 44, 47, 183 P. 443; Helpling v. Helpling, 50 Cal.App. 676, 680–681, 195 P. 715; Brazell v. Brazell, 54 Cal.App.2d 458, 459, 129 P.2d 117; Gough v. Gough, 101 Cal.App.2d 262, 268–269, 225 P.2d 668.

[10] We have concluded that section 122 of the Civil Code imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded as "in bar" of the plaintiff's cause of divorce based upon the fault of the defendant. Tested by the considerations discussed above, the evidence in the present case would have been ample to support a finding that the parties' misconduct should not bar a divorce. Reconciliation appears impossible. The trial judge himself observed that "the marriage here was a failure from the start" and that "there is nothing really to keep them together." There was evidence that defendant more than once inflicted bodily injury upon plaintiff; that after one severe beating plaintiff attempted to commit suicide by an overdose of sleeping pills; that defendant often boasted in the presence of plaintiff and guests of intimate relations with other women and discussed their physical attributes in detail; that defendant was often intoxicated; that defendant frequently told plaintiff that her daughter by a previous marriage had loose morals; that defendant was insanely jealous of a former suitor of plaintiff and on one occasion seized an alarm clock given plaintiff by the suitor and threw it into the toilet; and that defendant lavishly tipped waiters and spent his money freely in public, but in private life refused to give plaintiff sufficient funds to purchase clothes suitable for her station in life. On the other hand, defendant's evidence was to the effect that plaintiff had invented false accusations against him; that plaintiff had deliberately attempted to ruin his business life by writing a letter to his partner falsely accusing defendant of dishonesty and homosexuality; and that plaintiff had announced her intention of writing similar letters to other business associates of defendant. If

the foregoing facts are true, it is apparent that there has been a total and irremedial breakdown of the marriage. Technical marital fault can play but little part in the face of the unhappy spectacle indicated by this evidence, with its inevitable effect upon the family, friends, neighbors, and business interests of the parties.

Moreover, it is significant that the application of a strict rule of recrimination in the present action does not operate with equal justice. As the spouse entrusted by law with the management and control of the community property, see Civ.Code §§ 161a, 172, 172a, defendant is in a position to use that property for his personal benefit. Although he has an obligation to support plaintiff, a large discretion is customarily vested in the husband concerning the manner of performing that obligation; in the present case, disagreement and repeated legal actions to obtain support money are almost certain to ensue.

[11–13] There can be no precise formula for determining when a cause of divorce shown against a plaintiff is to be considered a bar to his suit for divorce, for the divorce court, as a court of equity, Sharon v. Sharon, 67 Cal. 185, 7 P. 456, 635, 8 P. 709, is clothed with a broad discretion to advance the requirements of justice in each particular case. In general, however, certain major considerations will govern the court's decision:

1. *The prospect of reconciliation.* The court should determine whether the legitimate objects of matrimony have been destroyed or whether there is a reasonable likelihood that the marriage can be saved. It should consider the ages and temperaments of the parties, the length of their marriage, the seriousness and frequency of their marital misconduct proved at the trial and the likelihood of its recurrence, the duration and apparent finality of the separation, and the sincerity of their efforts to overcome differences and live together harmoniously.

2. *The effect of the marital conflict upon the parties.* If a continuation of the marriage would constitute a serious hazard to the health of either party, as in the case of physical brutality, the court should be reluctant to deny divorce. Although financial considerations can play only a minor role in determining the propriety of divorce, even these may not be entirely ignored if the evidence indicates that marital conflicts are destroying the livelihood of the parties.

3. *The effect of the marital conflict upon third parties.* In every divorce case in which children are involved, their interests are of the utmost concern to the court. The disruptive effect of divorce upon children is to be deplored, but in a given case it may be preferable to violence, hatred, or immorality when these are present in the home. The community as a whole also has an interest. Adultery, desertion, or cruelty, for example, can only discredit marriage; their perpetuation is not lightly to be decreed.

4. *Comparative guilt.* In many ways the guilt of the parties may be unequal—in the gravity of the misconduct involved, in the frequency of its occurrence, or in its effect upon children and others. Moreover, one spouse may demonstrate substantially greater repentance and reform. Marital offenders, therefore, are not necessarily in pari delicto before the chancellor. Their comparative guilt may have an important bearing upon whether or not either one or both should be granted relief.

[14, 15] We have concluded that in light of the foregoing discussion the findings and conclusions in the present case are not sufficient to support the determination that recrimination was established. It is essential that findings be made on every material issue raised by the pleadings. Kusel v. Kusel, 147 Cal. 52, 57, 81 P. 297; Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260; Parker v. Shell Oil Co., 29 Cal.2d 503, 512, 175 P.2d 838; cf. LaMar v. LaMar, 30 Cal.2d 989, 902, 186 P.2d 678. As we have seen, whether or not the cause of action proved against each spouse is to be regarded as in bar of the cause of action proved against the other spouse is a material issue and must be expressly decided by the trial court before it may be said that recrimination has been decided. To decide the issue raised by a plea of recrimination, the court must consider the prospects of reconciliation, the comparative fault of the plaintiff and the defendant, and the effect of the marital strife upon the parties, their children, and the community.

[16] Upon remand of the case for application of the clean hands doctrine as herein indicated, the trial court may decide that one of the parties should be granted a divorce. In that event, alimony and more than half of the community property may be awarded to the prevailing spouse as in any other case. It is also possible, however, that a divorce will be granted to both parties, see Flagg v. Flagg, 192 Wash. 679, 686, 74 P.2d 189; Blunt v. Blunt, [1943] A.C. 517, 531 [H.L.], and it seems advisable to indicate here the rules that should govern the granting of alimony and the apportionment of community property under such circumstances. When a divorce is granted to both, alimony may be awarded to either, for the basis of liability for alimony is the granting of a divorce against the person required to pay it. See Civil Code, § 139. Section 146 of the Civil Code provides that if the divorce is granted for extreme cruelty, the court may apportion community property as it deems just, but that statute has been interpreted to permit an award of more than half of the community property only to an innocent spouse. Eslinger v. Eslinger, 47 Cal. 62, 64. When a divorce is granted to both parties, neither is innocent within the meaning of this rule, and the community property must be equally divided.

The judgment is reversed. The appeal from the order denying the motion for a new trial is dismissed. Defendant is to bear the costs of this appeal.

GIBSON, C. J., and CARTER, and SCHAUER, JJ., concur.

EDMONDS, Justice (concurring).

Solely upon the ground that there are contradictory, irreconcilable findings about matters material to a proper disposition of the case, I concur in the reversal of the judgment. Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 20, 87 P.2d 830; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 131, 137, 17 P.2d 712; Los Angeles etc. Land Co. v. Marr, 187 Cal. 126, 132, 200 P. 1051; Estep v. Armstrong, 91 Cal. 659, 663–664, 27 P. 1091; Learned v. Castle, 78 Cal. 454, 460, 18 P. 872, 21 P. 11. In view of the conflicting evidence, it would be inappropriate for this court to determine which finding is supported by the greater weight of the evidence and to order judgment accordingly. Spaulding v. Cameron, 38 Cal.2d 265, 270, 239 P.2d 625; Tupman v. Haberkern, 208 Cal. 256, 269–270, 280 P. 970.

In my opinion, these conclusions are determinative of the appeal. If, upon retrial, the evidence should disclose that each party has a cause of divorce against the other, as I read the Civil Code, the trial court will have no alternative but to deny each of them a divorce. Civ.Code § 111 (4). Likewise, if it should be proved that the conduct of each was provoked by the other, a divorce must be denied either party because neither one will have shown a cause of divorce. Cruelty which is provoked by the party seeking a divorce is not actionable. Harp v. Harp, 204 Cal. 193, 194, 267 P. 101; Popescu v. Popescu, 46 Cal.App.2d 44, 49, 115 P.2d 208. However, it may be that, although the evidence disclose cruelty on the part of each party, provocation for the acts of one upon the part of the other may be proved. In that event, the trial court properly might award a divorce to the party whose actions were provoked by the other.

This court cannot anticipate what the evidence upon another trial may disclose, nor can it predict what findings and conclusions the court will draw therefrom. The conclusion that the findings are in irreconcilable conflict disposes of the issue before us and the lengthy discourse upon the doctrine of recrimination is unnecessary and unwarranted dictum. However, because of my disagreement with the interpretation placed upon the statutory law of this state, I am compelled to state my views upon that question.

"The legislature has seen fit to make the doctrine [of recrimination] an integral part of the law of this state. It is not for the courts to determine the rightness or wrongness of the doctrine so declared. That is a legislative and not a judicial function." Comfort v. Comfort, 17 Cal.2d 736, 752, 112 P.2d 259, 268.

In effect, the court now repeals sections 111(4) and 122 of the Civil Code. Section 111 provides: "Divorces *must* be denied upon showing: * * * 4. Recrimination; * * *." Emphasis added. Section 122 defines recrimination as "a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."

Ignoring the mandatory "must" of section 111, the majority hold that the trial court may exercise its "discretion" in determining whether to grant a divorce where each party has shown a cause of divorce against the other. Using the language of Brenot v. Brenot, 102 Cal. 294, 296, 36 P. 672, it is said that "a court of equity is *authorized* to enter a judgment dismissing an action of divorce, where both parties are seeking a decree, and the evidence discloses them to be equally guilty of the misconduct alleged." But in the Brenot case no authority was cited for this conclusion, and the court did not consider the statute. Furthermore, the quoted statement is erroneous in implying that the parties must be equally guilty of the same misconduct. Under section 122, "any cause of divorce" is a sufficient basis for the defense of recrimination. The cause need not be the same as that relied upon by the other party. See White v. White, 82 Cal. 427, 452, 23 P. 276, 7 L.R.A. 799; Klemmer v. Klemmer, 42 Cal.App. 618, 622, 187 P. 85.

Reliance also is placed upon Glass v. Glass, 4 Cal.App. 604, 607, 88 P. 734. There the trial court found both parties guilty of extreme cruelty, but granted the plaintiff a divorce. The doctrine of recrimination was not relied upon by either of the parties, nor considered by the court, and the decision is not authority for the proposition that the mandatory language of section 111 may be disregarded.

In the present opinion "recrimination" is not defined. However, the inevitable implication of the analysis of the problem is that there is no such thing. It is acknowledged that a cause of divorce must be proved before the doctrine of recrimination may be applied. The conclusion is then reached that, after the defendant's cause is established, the trial court must determine whether it is "in bar" of the relief sought by the plaintiff.

The fallacy of such circuitous reasoning lies in the misinterpretation of the plain language of the statute. It is assumed that the phrase "in bar of the plaintiff's cause of divorce" refers back to the words "any cause of divorce". However, the structure of the sentence precludes any such interpretation. The phrase beginning with "in bar" is a modifying one deliberately separated from the preceding modifying language by a comma. As diagramed in Klemmer v. Klemmer, supra [42 Cal.App. 618, 187 P. 86], the sentence reads: "Recrimination is a *showing* by the defendant of any cause of divorce against the plaintiff, ***in bar of the plaintiff's cause of divorce.***" See De Haley v. Haley, 74 Cal. 489, 492, 16 P. 248. The word "showing" is modified by two separate, and equal, phrases. The first, "by the defendant of any cause of divorce against the plaintiff", explains the kind of "showing" which must be made. Such showing, if made, is "in bar of the plaintiff's cause of divorce."

The majority say 250 P.2d 600: "Had the Legislature meant to make every cause of divorce an absolute defense, it could easily have provided that: 'Divorces must be denied upon * * * a showing by the defendant of any cause of divorce against the plaintiff.'" They ignore the fact that section 122 is a definition of "recrimination" as used in section 111. In defining "recrimination" as a showing "in bar of the plaintiff's cause of divorce", the code commissioners simply adopted the accepted judicial definition of that term as stated in Conant v. Conant, 10 Cal. 249, 256, and the English cases there cited.

According to the majority opinion, "The California Legislature, in enacting the Civil Code in 1872, did not follow the principles of the Conant case. The Code provisions on recrimination made two important departures from the existing law." 250 P.2d 602. These, it says, were the requirement that the defendant prove a cause of divorce against the plaintiff and the rejection of the strict rule of the ecclesiastical courts.

But the code did not change the law as stated and applied in the Conant case. By that decision the court did not establish a doctrine that the plaintiff be "without reproach" to secure a divorce. It held that "where the matter pleaded is such as would entitle the defendant to a decree, had it been presented in a bill brought by himself, the relief should be denied." 10 Cal. at page 256. In using the words "without reproach", it specifically limited them to "similar guilt, or an offence to which the law attaches similar consequences". 10 Cal. at page 258. Because the now abandoned doctrine of two types of divorce then existed, the court did provide that a lesser guilt would bar a divorce *a vinculo matrimonii.* However, it is important to note that a divorce would be granted *a mensa et thoro* where the guilt of the plaintiff was not sufficient to have established a cause of divorce in the defendant.

In the Conant case the court also rejected the strict rule of the ecclesiastical courts. They had allowed only adultery as a bar to a suit for divorce. Under the Conant decision any offense stated by the statute could be pleaded in bar to the same or any other offense. This departure from the ecclesiastical rule was adopted by the code commissioners. It is understandable, therefore, that they should have relied upon the general principles upon which the Conant case was decided, rather than upon earlier divorce cases.

The note of the code commissioners states: "This section [sec. 122] rests upon the principle that he who is himself in the wrong cannot be heard to complain in a Court of justice of another's wrong pertaining to the same matter." The analogy which they used is strikingly similar to that stated in the Conant case where it was said: "It is a general principle of the common law that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants, to obtain success, must himself have performed the obligations on his part." That the code commissioners had a related principle in mind is clear from their citations of authority. Of the decisions to which they referred, five denied relief to a plaintiff relying upon an illegal or fraudulent contract. In each case, the basis of the holding was the doctrine of *in pari delicto.* Collins v. Blantern, 2 Wils.K.B. 341 [Eng.]; Gregg v. Wyman, 4 Cush. 322, 58 Mass. 322; Roby v. West, 4 N.H. 285; Freeman v. Sedwick, 6 Gill, Md. 29, 39–40; Gregory v. Haworth, 25 Cal. 653, 657. Bush v. Brainard, 1 Cow., N.Y. 78, stated the doctrine of contributory negligence as a defense to an action for gross negligence. Hyatt v. Wood, 4 Johns., N.Y. 150, held that a person having only the naked possession of land cannot maintain an action in trespass against a person having possessory title who has entered by force and evicted the possessor.

None of the decisions cited by the commissioners considered the public policy argument now presented. The full quotation from Freeman v. Sedwick, supra, the only one of those cases here relied upon, is as follows: "After a careful examination of the authorities, we are brought to the conclusion that Courts of equity have held, and uniformly decided, that it was both the wisdom and policy of the law to withhold all aid or relief from parties in controversies between themselves, who stood strictly *in pari delicto*, which might or could tend to the consummation of agreements entered into in fraud of the law, or the rights of any person. Mr. Justice Story, in his Commentary on Equity Jurisprudence, vol. 1, p. 317, sec. 298, says: 'The suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check, naturally connected with a want of confidence, and a sole reliance upon personal honor. And so, accordingly, the modern doctrine is established. Relief is not granted, where both parties are truly *in pari delicto*, unless in cases where public policy would thereby be promoted.'"

The notes of the code commissioners were first published by H. S. Crocker & Co. in an 1872 edition of the Civil Code annotated by two of the commissioners. In the preface to the annotated edition, those commissioners stated: "In some places the Code modifies or alters what has heretofore been the law. Wherever this occurs the reason for the change is given —the hardships which existed under the former law, and how the present enactment applies to prevent their future occurrence." P. vi.

Following out this purpose the commissioners noted every instance in which it was their intention to depart from the preexisting law. Illustrative of their comments are the following: "Sections 170 and 171 modify the common law in two respects." Sec. 170, p. 58. "This was the rule of the common law. The Commission deemed it advisable to modify it." Sec. 710, p. 215. "The words 'or for' are intended to supersede the doctrine of Sieman v. Austin, [33 Barb. 9]." Sec. 853, p. 249. "This section is a departure from the rule laid down in * * * (the cited) case." Sec. 908, p. 260. "The three preceding sections change the rule of our statutes * * *." Sec. 1286, p. 359. "This is an innovation upon the common law * * *." Sec. 1496, p. 443. "This is contrary to the former law upon this subject * * *." Sec. 1500, p. 444. "This Chapter undoubtedly modifies the rule heretofore existing in this State as to mistake of law." Sec. 1576, p. 467. "This section modifies the law heretofore existing." Sec. 1714, p. 519. "This section, and some of the ensuing ones, differ materially from the common law * * *." Sec. 1864, p. 573. Further examples of this careful attention to alterations in the prior law appear in the annotations to sections 245, 296, 400, 954, 1383, 1384, 1488, 1624, 1658, and 1941.

Had the code commissioners intended to modify the doctrine of recrimination, as stated in the Conant case, so drastically as it is now said that they did, certainly they would have been as explicit in the annotation to section 122 as they were in their notes to other sections. It is clear that the commissioners made every effort to leave nothing to implication and to stress each alteration or clarification which was intended by their work. If it was their intention to adopt, as a limitation upon the defense of recrimination, the dictum exception to the doctrine of *in pari delicto* mentioned in the quotation from Mr. Justice Story by the Maryland court in the Freeman case, it would have been a simple matter to have worded the statute accordingly. Instead, the commissioners provided that "any cause of divorce against the plaintiff" is a sufficient showing in bar of the plaintiff's cause and requires a denial of relief. Rather than stating any modification or alteration of what was theretofore the law, they bolstered the unequivocal language of the statute by explaining that "he who is himself in the wrong cannot be heard to complain". The authorities which they cited denied relief in each instance. Certainly if they had intended any such exception as is now added to the code section, they would have modified the language of the statute, mentioned that purpose in their annotation, or at least have cited authorities applying the exception to the general rule.

By now saying that "the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty", in effect, this court repeals the statutory rule of recrimination. Thus, in any case where, by the terms of the statute, recrimination is a bar, it should not be applied because of public policy. Only the embalmed corpse of the doctrine is preserved, impotent in the shroud of standards established "for determining when a cause of divorce shown against a plaintiff is to be considered a bar to his suit for divorce".

Among other standards which the trial court must now use to determine whether the cause is proved is "in bar" of the plaintiff's cause of divorce is one called "comparative guilt". No authority is given for this invention, startling as applied to the grounds for divorce, and indeed, none can be found for it. Section 92 of the Civil Code provides that divorces may be granted for any one of seven enumerated causes. No distinction is made between them, nor are there varying degrees of any cause. All stand on an equal footing insofar as the granting of a divorce is concerned. "In this State, the statute has specified certain acts or conduct which shall constitute grounds of divorce, and so far as the matrimonial contract is concerned, the Courts cannot distinguish between them, whatever difference there may be in a moral point of view." Conant v. Conant, supra, 10 Cal. at page 256.

Whether a cause of divorce is established is simply a matter of proof. If the evidence is sufficient to sustain a decree upon any one of the statutory grounds, a cause of divorce is shown and cumulative evidence does not give it greater sanctity. Either a cause of divorce is established or it is not. Once established, it is neither more nor less effective than any other cause as the basis for a divorce or a bar to the other spouse's cause of divorce. And yet, it is now held, these causes, equal under the law, must in some metaphysical fashion be measured or weighed by the trial judge. By comparing the equal, inequality may be discovered. Beyond the superlative of "extreme" or "utmost" cruelty the court may find an indescribable infinity which is more than utmost, an unimaginable degree of cruelty which is greater than the greatest.

That the doctrine of recrimination has been repealed is made crystal clear by the suggestion "that a divorce will be granted to both parties". The code makes no provision for such a decree and the result is contrary to the requirement that a divorce "must be denied" when recrimination is proved. "Certain consequences are attached to the decree, independent of the dissolution of the marriage contract, and they are generally more favorable to the party obtaining the relief than to the contestant; but a decree can not be granted in favor of one, and afterwards in favor of the other, as the first would dissolve the marriage, and then no marriage would subsist, upon which the second decree could act; and a decree granting a divorce in favor of each, would be an anomalous proceeding." Conant v. Conant, supra.

The Civil Code contemplates that a divorce can be awarded to only one party. Section 131 provides in part: "If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that *the party* in whose favor the court decides is entitled to a divorce; * * *." (Emphasis added.)

It is noteworthy that the only American authority cited for the proposition that both parties may be awarded a decree is Flagg v. Flagg, 192 Wash. 679, 686, 74 P.2d 189, decided in a jurisdiction which has no statute relating to recrimination. Even there, no authority was cited for the holding, nor has the decision since been followed.

The anomaly of awarding a divorce to both parties is further stressed by the discussion of alimony and property rights. The majority say: "When a divorce is granted to both, alimony may be awarded to either, for the basis of liability for alimony is the granting of a divorce against the person required to pay it. See Civil Code, § 139." But section 139, as amended in 1951, contemplates, in the singular, only "the party against whom the decree or judgment is granted". No provision is made for the situation where a decree is granted against both parties. That such an eventuality was not anticipated by the Legislature is obvious from section 142, which provides: "When the *prevailing party* in the action has either a separate estate, or is earning his or her own livelihood, * * * the court in its discretion, may withhold any allowance to *the prevailing party* out of the separate property of the other party." (Emphasis added.) Clearly, the Legislature did not foresee a prevailing party against whom the decree might be granted.

By statute, 32 American jurisdictions allow the defense of recrimination. In only three of these may the court, in its discretion, grant a divorce after proof of recrimination. Except for these three, recrimination is, by statute, an absolute defense in the majority of states. 2 Vernier, American Family Laws, p. 87. The decisions from other states and England, here cited as recognizing judicial discretion, all rely upon different statutes or declare judicial policy in the absence of statute. The policy which underlies these exceptions to the general rule may be commendable. But this court should not usurp the legislative prerogative by the device of interpreting a statute which needs no interpretation, and which has been accepted without question for eighty years. If public policy no longer condones the doctrine of recrimination, then it is for the Legislature, and not for the court, to repeal the statute.

SPENCE, J., concurs.

SHENK, Justice, (concurring and dissenting).

I concur in the judgment of reversal on the ground that the findings are contradictory and irreconcilable. I disagree with the meaning given to the phrase "in bar of the plaintiff's cause of divorce" which appears in section 122 of the Civil Code. It seems to me that those words were inserted in the statute for a purpose foreign to that now ascribed to them.

Section 111 of the Civil Code reads: "Divorces must be denied upon showing * * * 4. Recrimination". The limitation of that defense in an action for divorce is continued in section 122. That section defines "Recrimination" as "a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." Separate maintenance is an available remedy where a cause of divorce exists, section 137, Civ.Code, but because of a showing of recrimination a divorce may not be granted. Section 111.

There is thus no warrant for disapproving or overruling prior cases. When, as in this case, the court is faced with a showing of recrimination (any cause of divorce) on the part of each spouse in resisting a divorce sought by the other, there is no choice except to deny the divorce to both. On a record which undeniably supports a finding of recrimination on the part of each spouse, the trial court must be assumed to have exercised all of the discretion that it had if the denial of the divorce was based on that finding.

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114 Cal.App.2d 521

RENSHAW v. HAPPY VALLEY WATER CO.

Civ. 8185. Sac. 6271.

District Court of Appeal,
Third District, California.

Dec. 3, 1952.

Quiet title action, wherein defendant filed a cross-complaint seeking reformation of certain written instruments, the pleadings, and a final decree in a partition suit in which the parties had previously been involved. The Superior Court, Shasta County, Ben R. Ragain, J., rendered judgment favoring defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained the finding of mutual mistake justifying reformation.

Affirmed.

1. Reformation of Instruments 🔑6, 19(1)

Reformation is proper where instrument fails to express intentions of parties due to their mutual mistake, and this principle is applicable to judgments and decrees, since equity will as readily reform a judgment as it will a deed or other document.

2. Reformation of Instruments 🔑19(2)

"Mutual mistake" for which reformation will lie must involve a misconception shared by both parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Mutual Mistake".

3. Reformation of Instruments 🔑19(2)

As regards reformation of instruments for mutual mistake, it makes no difference who wrote instrument to be reformed, so long as all parties were in common mistake as to what was contained therein.

4. Appeal and Error 🔑931(1)

On appeal from decree reforming instruments, appellate court would have to accept testimony supporting finding of mutual mistake.

5. Reformation of Instruments 🔑45(1)

Evidence sustained finding of mutual mistake justifying reformation of certain written instruments, pleadings, and final decree in partition suit in which parties had previously been involved.

6. Judgment ⚷518

Suit for reformation of decree in partition did not constitute a collateral attack upon a final judgment, the legal validity of such judgment being admitted and the question for determination being whether such adjudication was procured by fraud or mistake.

7. Perpetuities ⚷6(1)

Reservation of minerals not known to exist is not illegal for placing perpetual cloud upon title.

8. Appeal and Error ⚷1011(1)

Conflicts in evidence were concluded by trial court's findings.

◆

Alvin M. Cibula, Glenn D. Newton, Redding, for appellants.

L. C. Smith, Chenoweth & Leininger, Redding, for respondent.

VAN DYKE, Justice.

Plaintiffs and appellants began action to quiet title to certain real property located within the boundaries of the area served by the Happy Valley Water Company, a public utility corporation in Shasta County. The complaint was in the usual form. It alleged ownership in the plaintiffs, claims of interest on the part of the defendant and that such claims were without right. Defendant and respondent, Happy Valley Water Company, filed a cross-complaint wherein it claimed an interest in the property and also sought a decree reforming certain written instruments, the pleadings, and a final decree, in a partition suit to which appellants and respondent had been parties. Reformation was granted and the respondent was adjudged to have in the lands of the plaintiffs the interests it claimed.

The facts and circumstances out of which this controversy arose are as follows: The respondent water company is successor in interest to a former irrigation district which was dissolved in 1925. The decree of dissolution declared liens upon the lands within the district in favor of respondent water company to the extent of $60 per acre, payable at the rate of $2 per acre per year. The decree required the landowners to purchase a certain amount of water annually from respondent. These liens and charges proved to be very burdensome and the landowners found that sales could not be made advantageously and that loans could hardly be obtained at all. Through the years respondent acquired a considerable amount of the lands that had been within the dissolved district and in 1946 appellants purchased from respondent 160 acres of lands so acquired by it. By respondent's deed conveying the land to appellants there was reserved to the grantor: 1. An undivided one-half interest in such oil, gas and other minerals as might exist in the land with the right to enter the property to extract the same. 2. Rights of way over the land for all existing easements and such additional easements for ditches, canals, pipe lines and the like as respondent should thereafter determine to be necessary for the development of the lands and the performance of its public utility duties. 3. Rights of ingress for construction and repair. In addition to the foregoing reservations, the deed contained a covenant whereunder appellants as grantees waived any right to receive water service from respondent water company. The liens imposed by decree, due to the heavy burdens they cast upon all of the lands involved, including those of appellants, became the object of concerted action by interested parties, including the respondent water company. A compromise was arrived at whereby these liens could be discharged and various title companies joined with the landowners and the water company in working out a plan whereby the discharge of the liens could be established of record. By this plan interested landowners would group together and convey their lands to some person selected to act as an accommodation plaintiff in a partition suit. This person would convey a token interest to a title company and then file a suit in partition, joining the respondent water company and the newly-created tenant in common as defendants. The respondent, having received the compromise consideration for its liens, would default and thereafter the token interest of the tenant in common would be reconveyed to the plaintiff and the proceeding would end with a decree quieting title in the plaintiff against the respondent's liens. The accommodation plaintiff would then reconvey the various parcels included in the suit to the parties who had conveyed to him. Appellants joined in one of these partition actions. The person selected to act as accommodation plaintiff was L. C. Smith, an attorney at law practicing in Redding, who was also the regularly employed attorney for the respondent company. Pursuant to the plan appellants conveyed their property to Smith, but in the deed they made no reference to any of the liens, restrictions or reservations which appeared in the deed from the respondent to them. When Smith prepared the complaint in partition he also omitted to mention the reservations and restrictions in favor of respondent company and these reservations and restrictions were omitted from all of the proceedings thereafter including the final decree. Respondent, notwithstanding this, permitted its usual default to be entered, so the result was that by the final decree in partition, title was quieted in appellants, and respondent lost all interest in the land. So far as the liens declared by the old dissolution decree were concerned, this result was according to plan. In the present action, and by cross-complaint, the respondent sought to reform the proceedings in partition so as to again reestablish the reservations, restrictions and covenants that were contained in its original deed conveying the land to appellants. It sought this reformation upon the ground of mistake.

The findings of the trial court were in favor of respondent, the court finding that the subject reservations, restrictions and covenants were omitted from the deed from appellants to Smith, the complaint, summons and decree in the partition action, and from the deed from Smith back to the appellants and that these omissions were all by the mutual mistake of the parties in that it was not intended by the partition action to eliminate these reservations, restrictions and covenants, but was the purpose only to eliminate the liens decreed by the old decree of dissolution. From the decree herein, reestablishing in favor of respondent the reservations, restrictions and covenants contained in its original deed to the appellants, this appeal was taken.

[1–5] It is first contended by appellants that reformation must be denied because the mistake, if any, was not mutual, appellants arguing that the mistake was unilateral. Reformation is proper where an instrument fails to express the intentions of the parties due to their mutual mistake and this principle is applicable to judgments and decrees. Douglass v. Dahm, 101 Cal.App.2d 125, 224 P.2d 914. Equity will as readily reform a judgment as it will a deed or other document. Id. By mutual mistake is meant a situation where both parties share the same misconception. National Auto. Ins. Co. v. Industrial Acc. Comm., 27 Cal.App.2d 225, 227, 80 P.2d 1024. In this connection it makes no difference who wrote the instruments to be reformed so long as all parties were in common mistake as to what was contained therein. Jefferson v. Pietroroia, 5 Cal.2d 222, 224, 54 P.2d 7. Applying the above principles to the present case, the finding of mutual mistake is supported by the record. Smith testified that the only purpose of the suit was to eliminate the liens created by the decree of dissolution and that the presence or absence of the reservations from the descriptions used were never discussed. Witness Plotts testified that the sole purpose of the suit was to clear the land of the old liens, that it was taken for granted that the reservations, restrictions and covenants contained in the deed from the respondent to appellants would be preserved and that the respondent would not have defaulted in the partition suit had it been known that such claims would be eliminated. It seems clear that, accepting, as we must, the foregoing testimony that there had been no intention to effect the removal of any claims against the subject property except only the old liens declared by the dissolution decree, the parties throughout mistakenly failed to understand that the interests of the respondent reserved to it in its deed to the appellants were likewise being abolished. It is easy to understand how this came about. There was, of course, no necessity of setting forth these claims of the respondent in the deed to Smith, the accommodation plaintiff. But the omission thereof from the descriptions used in the partition proceedings made it incumbent upon the respondent to affirmatively set them up or lose them by default. It appears that it was not until quite some time after the decree had become final that respondent discovered what had happened. This discovery was made when appellants demanded water service and were refused. In the ensuing argument the respondent discovered what had occurred. Thereupon appellants brought this action to quiet title and respondent, pleading the mistake and asking reformation, successfully set up its claims against the property. We think the facts and the findings fully justified reformation.

[6] It is contended that reformation of the decree in partition could not be had because it amounted only to a collateral attack upon a final judgment. But that is a misnomer of the action for reformation set up in the cross-complaint. Concerning such an action it was said in Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 25:

> "In fact, when an action is brought in a court of equity to set aside a judgment at law, the attack, although not collateral, is always indirect. Freem. Judgm. § 485. The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity or apparent validity that the plaintiff requires to be relieved from it."

[7] It is contended that the reservations and restrictions decreed to exist in favor of respondent are illegal and void as against public policy, appellants arguing that a reservation of minerals not known to exist is illegal because it places a perpetual cloud upon the title. The contention is without merit. The reservation is a common one appearing in numberless deeds of record in this state. That mineral rights may be severed from the total ownership by grant or reservation see 58 C.J.S., Mines and Minerals, § 151, p. 305. Such a reservation is not void because no time is fixed for claiming the rights reserved. 58 C.J.S., Mines and Minerals, § 154, p. 312. With respect to reservation of gas and oil, whether known or unknown, the objection made is not sound. Natural oil and gas in place are generally not subject to absolute ownership apart from the soil and a grant or reservation thereof usually carries only an incorporeal right of servitude to explore for and extract such minerals from the soil, the estate in the oil and gas becoming vested and absolute only when it is actually found and reduced to possession. 58 C.J.S., Mines and Minerals, § 155(4), p. 320. As a general rule a grant or reservation of all minerals includes all minerals found on the premises whether or not known to exist. 58 C.J.S., Mines and Minerals, § 155, p. 324.

[8] A number of other matters are argued by appellants but our examination of these contentions leads us to conclude they are in essence arguments based upon matters which are the subject of conflict in the evidence and which therefore are matters concluded in the trial court by its findings of fact.

The judgment appealed from is affirmed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

114 Cal.App.2d 544

LOPEZ et al. v. CAPITI.

LAMB et al. v. CAPITI.

EDGE v. CAPITI.

Civ. 4445.

District Court of Appeal,
Fourth District, California.
Dec. 3, 1952.

Three actions against the same defendant for death and injuries from automobile accident. The Superior Court of San Bernardino County, Carl B. Hilliard, J., took under submission plaintiffs' motions for judgment notwithstanding verdict, made immediately after return of verdict in open court on May 24, and, without thereafter acting on said motion, granted subsequent motions for new trial on July 30, and defendant appealed. The District Court of Appeal, Griffin, J., held that the motions for judgment notwithstanding verdict operated to automatically stay entry of judgment, and, thus, the granting of the motions for new trial was within time allowed by Code of Civil Procedure.

Orders affirmed.

1. Judgment 🔑276

Where motions for judgment notwithstanding verdict, made upon return of verdict in open court on May 24, were taken under submission, entry of judgment was automatically stayed, and, thus, the making of said motions could not operate as waiver of written notice of entry of judgment. Code Civ.Proc. § 664.

2. New Trial 🔑116(2)

Where motions for judgment notwithstanding verdict, made upon return of verdict in open court on May 24, were taken under submission and were not thereafter acted upon, time in which motions for new trial might be granted commenced to run, not from May 24 when clerk erroneously entered judgment, but from June 4 and 7 when notices of intention to move for new trial were filed. Code Civ.Proc. §§ 657, 659, 660, 664.

3. New Trial 🔑116(2), 155

Where motions for judgment notwithstanding verdict were made immediately after return of verdict in open court on May 24, and were taken under submission, notices of intention to move for new trial filed on June 4 and June 7 were not premature, and the granting of motions for new trial on July 30 without further action on original motions, was timely and proper. Code Civ.Proc. §§ 657, 659, 660, 664.

4. Appeal and Error 🔑1015(3)

On motion for new trial of action for injuries sustained in automobile accident, question of weight of entire evidence produced was for trial court.

5. Appeal and Error 🔑933(1)

On an appeal from an order granting a new trial, all presumptions are in favor of the order and against the verdict.

6. New Trial 🔑70

A new trial should be granted whenever in the trial court's opinion the evidence is insufficient to justify the decision.

7. Appeal and Error 🔑979(2)

Granting a new trial on ground of insufficiency of evidence is discretionary with trial judge to extent that, if any appreciable conflict exists in the evidence, such action will not be disturbed on appeal unless it is affirmatively shown or manifestly appears that trial judge abused sound discretion confided to him.

8. New Trial 🔑70

In action against defendant motorist who allegedly went through a stop sign, struck automobile of plaintiffs who were proceeding along thoroughfare, and then struck automobile of plaintiffs who were approaching stop sign on other side of thoroughfare, trial court did not abuse discretion in denying defendant's motions for new trial made on ground of insufficiency of evidence.

◆

John Lewis King, San Bernardino, for appellant.

Harold D. Mefford, Hayward, Julius J. Novack, San Bernardino, for respondents.

GRIFFIN, Justice.

The three actions against defendant Capiti arose out of a collision between an automobile driven by Capiti, an automobile driven by a Mr. Lamb, and one driven by plaintiff Victor A. Lopez, Jr. The collision first occurred between the Capiti vehicle and the Lamb vehicle. Lamb was killed. Plaintiff Edge, a passenger in the Lamb car, was injured. Thereafter, Capiti's vehicle collided with plaintiff Lopez's vehicle. One action was brought by the heirs at law of Lamb, one by plaintiff Edge, and one by Lopez and his wife. The latter two actions were for personal injuries.

On May 24, 1951, the jury returned a verdict, in open court, in favor of defendant Capiti, and against all plaintiffs. A judge, other than the trial judge, received the verdict. At that time each and all of the plaintiffs moved the court for judgment notwithstanding the verdict. That judge ordered that the motions be taken under submission, to be determined by the trial judge. Thereafter, and on the same day, the clerk entered a judgment on the verdict. Without any further attention of the trial judge being called to the motions, on June 4, 1951, plaintiffs Edge and Lamb, et al., filed a notice of intention to move for a new trial on the ground of insufficiency of the evidence. As to plaintiffs Lopez, et al., a notice of intention to move for a new trial was filed on June 7, and denied by written order made on August 8. The order was filed on August 9th. At the hearing of the motions for a new trial before the trial judge, apparently no request was made for a ruling on the motion for judgment notwithstanding the verdict, nor was the court's attention called to it, and apparently no point was, at that time, made of that fact. After hearing the motions for new trial, on July 17, 1951, said motions were taken under submission. On July 30, a minute order was made granting the motions. A written order, pursuant to section 657 of the Code of Civil Procedure was required, and on July 30, a signed order was made granting the motions for new trial, which order was filed on July 31.

Defendant, on August 16, filed a notice of appeal from the order "made on the 30 day of July, 1951, setting aside the verdict * * * and granting a new trial * * *."

Defendant's first contention is that the trial court was without jurisdiction to grant a new trial. This is predicated upon the claim that more than 60 days had elapsed between the notice of entry of judgment and the order granting a new trial; that although no written notice of entry of judgment was served, by the affirmative act of counsel for plaintiffs moving, on May 24th, in open court, for judgment notwithstanding the verdict of the jury, plaintiffs waived written notice of entry thereof; that such waiver was as effective as though such notice was given on that date. In support of this they cite such cases as Timmons v. Cooney, 39 Cal.App. 35, 37, 179 P. 429; Hughes v. De Mund, 195 Cal. 242, 233 P. 94; Forni v. Yoell, 99 Cal. 173, 176, 33 P. 887; and Jansson v. National Steamship Company, 34 Cal.App. 483, 485, 168 P. 151.

As to the Lopez case, under point 2, it is contended that under the construction sought to be applied by defendant, the last day to file the motion for a new trial was on June 4th, and therefore, the motion filed on June 7th was ineffective, citing Gardner v. Stare, 135 Cal. 118, 119, 67 P. 5, and Sec. 659, C.C.P.

As a third point, defendant argues that the notice of intention was prematurely filed because the judgment under section 664, C.C.P. was ineffective for any purpose.

[1-3] The cases relied upon by defendant are factually distinguishable. Under section 664, supra, the entry of the judgment on the verdict, pending the hearing of the motion for judgment notwithstanding the verdict, was automatically stayed. The clerk had no authority to enter it at that time. The erroneous entry thereof was ineffective for the purpose of starting the time running in which a motion for new trial might be granted. Moreover,

the motion for judgment notwithstanding the verdict was made *before* the clerk, in fact, erroneously entered the judgment. Accordingly, it could not operate as a waiver of written notice that the judgment had been entered. Plaintiffs would not be called upon to anticipate that the clerk would enter a judgment on the verdict until the motion for the judgment notwithstanding the verdict had been determined. Therefore, the period commenced to run from the date of filing the notice of intention to move for a new trial. Parr v. Swanson, 102 Cal.App.2d 666, 228 P.2d 26; Reed v. Cortez, 88 Cal.App.2d 416, 198 P.2d 911. Under section 659, C.C.P., prior to its amendment in 1951, Stats.1951, chap. 801, p. 2288, effective on January 1, 1952, a motion for new trial may be properly made *before* entry of judgment, or within ten days after receiving notice of such entry. Under section 660, C.C.P., the power of the court to pass upon the motion expires 60 days after service of such written notice, or if none is served, 60 days after filing notice of intention to move for a new trial. A notice of intention to move for a new trial in the Edge and Lamb cases, being filed on June 4, the granting of the motions on July 30 was timely.

As to the Lopez case, since the filing was on June 7, the motion for new trial was granted (by minute order on July 30) within the time prescribed by the section. The written order specifying the grounds was filed with the clerk within ten days after it was granted, as required by section 657, C.C.P. This sufficiently disposes of the preliminary questions raised on this appeal.

[4–8] Under point 4, defendant claims that the trial court abused its discretion in granting the motions for a new trial on the ground of insufficiency of the evidence. A brief statement of the evidence supporting plaintiffs' allegations of negligence of defendant, although in conflict in certain respects, shows that the Lamb car was being driven north on I Street, a thoroughfare guarded by stop signs on that street; that defendant Capiti was traveling East on Ninth Street, and Lopez was driving West on that same street; that Capiti's car went through the stop sign; that it first struck the Lamb car in the intersection, then swerved across the street at an angle and struck the Lopez automobile nearly head-on as that car approached the stop sign from the East. There were some inconsistencies in the testimony of some of the witnesses between their testimony at the time of trial and their testimony given at a former hearing, and some conflict in the evidence. The question of the weight of the entire evidence produced was for the trial court to determine on a motion for a new trial. On an appeal from an order granting a new trial, all presumptions are in favor of the order and against the verdict. It should be granted whenever in the trial court's opinion the evidence is insufficient to justify the decision. Granting a new trial on the ground of insufficiency of the evidence is discretionary to the extent that if any appreciable conflict exists in the evidence, such action will not be disturbed on appeal. Norden v. Hartman, 111 Cal.App.2d 751, 245 P.2d 3. A trial judge will not be reversed in his ruling on a motion for a new trial unless it is affirmatively shown or manifestly appears that he has abused the sound discretion confided to him. Perry v. Fowler, 102 Cal.App.2d 808, 812, 229 P.2d 46; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213. No such abuse here appears.

Orders granting new trials affirmed.

BARNARD, P. J., concurs.

MUSSELL, J., did not participate herein.

114 Cal.App.2d 566

PEOPLE v. BURNS et al.

Cr. 4849.

District Court of Appeal, Second District,
Division 3, California.
Dec. 4, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Kenneth C. Newell, J., of burglary of an automobile, and he appealed from the judgment and from the order denying his motion for a new trial. The District Court of Appeal, Wood, J., held that evidence did not justify conviction and that a given instruction was error prejudicial to defendant.

Judgment and order reversed.

1. Burglary ⚷41(1)

Evidence was insufficient to support a finding that doors of an automobile which defendant was charged with burglarizing were locked, so that evidence did not justify conviction of burglary in second degree. Pen.Code, § 459.

2. Criminal Law ⚷814(16), 1172(6)

In prosecution for burglary of an automobile, wherein there was no evidence that defendant made a confession, given instruction that jury could not consider a confession unless confession was voluntarily made, and that, although evidence tending to show that defendant made a confession was admitted, confession should be disregarded unless it was made and was voluntary, was error prejudicial to defendant. Pen.Code, § 459.

* * *

Ellery E. Cuff, Public Defender, and J. Stanley Brill, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants Burns and DeCosta were accused of burglary, committed by entering an automobile, the doors of which were locked. Burns admitted an allegation in the information that he had been convicted previously of a felony. In a trial by jury the defendants were found guilty of burglary in the second degree. Burns was referred to the California Youth Authority. DeCosta's application for probation was denied, and the judgment was that he be imprisoned in the county jail for one year. He appeals from the judgment and from the order denying his motion for a new trial.

Appellant contends that the verdict is contrary to the evidence and the law; the court erred in receiving extrajudicial statements in evidence, and erred in instructing the jury.

On January 1, 1952, two police officers in an automobile were patrolling an area near the Pasadena Rose Bowl, where automobiles were parked by persons who were attending the football game. The automobiles were parked in double rows with lanes between the double rows so that the automobiles could be driven from the parking area. In the front row of one of the double rows there was a Buick 4-door sedan automobile, facing south, which had an Illinois license plate on it. In the rear of that double row and directly behind the Buick automobile there was a Pontiac automobile which was facing north. The backs of the two automobiles were about 4 feet apart.

One of the officers testified that he was driving the police automobile in a westerly direction in the lane near the Buick; when he was about 30 feet from the Buick, he saw the appellant who "kind of raised up" behind the Buick, stood facing the officers, and moved his lips; appellant then turned around and walked to the Pontiac, which had "a lot of people" in it; he (witness) stopped the police automobile and the other officer got out, walked between the Buick and Pontiac and talked to appellant; about 2½ minutes later the left front door of the Buick opened and defendant Burns got out of the Buick; he (witness) immediately got out of the police automobile and questioned Burns; Burns stated that he was not the owner of the automobile—he was in the automobile waiting for the people who owned it to come back from the football game; he (witness) examined the Buick and saw that the left windwing was broken; scattered glass was on the front seat, and glass was on the running board; the glove compartment was open, a flash light was on the floor, and a leather carrier for camera bulbs was open on the front seat; a suitcase was open on the rear seat; also a checkbook, letters, papers and miscellaneous articles were on the rear seat. He also testified that he and the other officer had a conversation with the defendants at the police station; appellant, in the presence of Burns, said that he left the Pontiac, went for a walk, returned to the rear of the Pontiac and was "looking for what was making a rattle" in the car, and when "he raised up between the cars" he saw the police car and saw Burns inside the Buick; Burns jumped out of his chair and said that he was not going to take this beef alone, that appellant smashed the rock into the window, reached in and unlocked the window so that the door could be unlocked, and told Burns to go in and go through it, and he would keep watch by the car; after Burns made those statements, appellant said that Burns was lying.

The other officer testified that there were seven persons in the Pontiac—three girls and four boys; the Pontiac was registered in the name of the father of one of those boys; when he walked over to appellant he (officer) asked him what he was doing "down there," and appellant said that he was stretching his legs—that he and the other occupants of the Pontiac had been to the Rose Parade that day and in leaving had been caught in traffic going to the Rose Bowl; they were unable to get out of the traffic and were waiting in the parking area for traffic to ease up so they could leave. The officer also testified that he had a conversation with Mr. Schmidt, the owner of the Buick, in the presence of the other officer and the two defendants; Mr. Schmidt said that he lived in Dixon, Illinois; that on January 1st, about 2 p. m., he parked his Buick near the Rose Bowl, "that he had left all of the doors and vent wings in a locked condition," and he gave no one permission to enter the vehicle in his absence; Mr. Schmidt also said that his son left a camera case on the front seat and his wife left a train case on the back seat, that when he returned to the car after the football game he found that the left front vent window had been broken, and it was open. The officer testified that he then asked the defendants if they had anything to say to Mr. Schmidt; and that Burns stated that he was sorry that it had happened; and appellant did not say anything.

Appellant testified that he went in the Pontiac to the Rose Parade; eleven persons, including Burns, were in the Pontiac; appellant met Burns on December 31st; after they left the parade they were caught in traffic which was going to the Rose Bowl; they asked officers to let them through the road blocks, but the officers replied that it was impossible; one Porter was driving the car, and after they arrived in the Rose Bowl parking area Porter suggested that they stay there until traffic on the highway had cleared; at the time the Pontiac was parked, the Buick was not there; appellant, Burns and two of the other boys got out of the Pontiac; Burns walked toward the Rose Bowl; appellant and the other boys walked in another direction; when appellant and the two boys returned to the Pontiac, some one mentioned that something under the Pontiac was scraping; he looked under the rear of the car, and when he straightened up he saw the police car; at that time he first noticed the Buick; he did not know where Burns was and he had not seen him since he walked toward the Rose Bowl; when he saw the police officers, he did not call to anyone—his lips move frequently due to nervous tension. He testified further that Burns did not state in his presence that he was not going to take the beef himself, or that appellant broke the window of the Buick with a rock and unlocked the door, or that appellant had told Burns to get in the Buick and see what he could find and appellant would stand beside the Buick.

[1] Appellant contends, as above stated, that the verdict is against the evidence and the law. He argues that one of the essential elements of burglary of a vehicle is that the doors of the vehicle must have been locked; and that the evidence was insufficient to support a finding that the doors of

the Buick were locked. Section 459 of the Penal Code provides: "Every person who enters any * * * vehicle as defined by said [vehicle] code *when the doors of such vehicle are locked* * * * with intent to commit grand or petit larceny or any felony is guilty of burglary." (Emphasis added.) In order to prove said charge of burglary, it was necessary to prove that the doors of the Buick were locked, immediately prior to the time Burns entered the Buick. The owner of the Buick did not testify. No one testified that the doors were locked at the time the Buick was left at the parking place or that they were locked at any time. There was testimony of an officer, over the objection of appellant, to the effect that, in the presence of appellant, Burns said that appellant broke the window with a rock and unlocked the window. The officer also testified that appellant promptly replied to Burns' statement by saying that Burns was lying. Presumably said testimony of the officer was received for the purpose of showing the demeanor of appellant in the face of an accusatory statement. Appellant's prompt denial of Burns' accusatory statement was not, of course, demeanor which would amount to an admission that the doors were locked, and it was not demeanor from which an inference of guilt could be drawn. In People v. Smith, 25 Cal.App.2d 241, at page 247, 77 P.2d 277, at page 280, it was said that an accusatory statement "is never admissible as proof of any fact, but solely for the purpose of showing the demeanor and actions, if any, of the defendant in the face of an accusatory statement; and when such accusatory statement is promptly denied by the defendant, it is inadmissible for any purpose." The further testimony of an officer that the owner of the Buick said, in the presence of both defendants, that he left all the doors and vent wings in a locked condition was not evidence that the doors and wings were locked. The alleged statement of the owner was not made by him as a witness, and he was not subject to cross-examination. The court advised the jury, immediately after the testimony of the officer had been given, that the statement of the owner was not to be considered as evidence of the truthfulness of the owner's statement, but it was to be considered only in the nature of an accusatory statement. As stated above, the appellant did not say anything when the officer asked him if he had anything to say to the owner. The statement of the owner did not call for a reply by appellant. It was not an accusation against appellant and his silence was not an admission that the doors were locked, and it was not indicative of consciousness of guilt. (The position of appellant was different from that of Burns who had entered the Buick.) The fact that the windwing was broken and glass was on the front seat was not proof that the doors of the Buick were locked, and an inference could not be drawn from that fact that the doors were locked. There was no evidence as to the condition of the windwing at the time the Buick was left at the parking place—the broken condition could have been caused in various ways not related to the alleged burglary. The evidence was insufficient to support a finding that the doors of the Buick were locked.

[2] Appellant contends further that the court erred in giving the following instruction: "The law absolutely forbids you to consider a confession in determining the innocence or guilt of a defendant unless the confession was voluntarily made, and although *the court has admitted evidence tending to show that defendant made a confession,* you must disregard the asserted confession entirely unless you * * * conclude that the alleged confession not only was made, but was voluntary. * *" (Italics added.) The italicized portion of the instruction implies that there was evidence tending to show that a confession was made. There was no evidence tending to show that appellant made a confession. The instruction was inapplicable to appellant, and as to him it was prejudicially erroneous.

In view of the above conclusions, it is not necessary to determine other contentions of appellant.

The judgment and the order denying the motion for a new trial are reversed.

SHINN, P. J. and VALLÉE, J., concur.

114 Cal.App.2d 584

STOCK v. MEEK et al.

Civ. 18953.

District Court of Appeal, Second District,
Division 2, California.

Dec. 5, 1952.

Action to rescind purchase of an apartment unit in a hotel and to recover amount paid therefor. Defendants filed a counterclaim for interest paid plaintiff on an allegedly usurious loan. The Superior Court, Los Angeles County, Raymond McIntosh, J., granted defendants' motion for nonsuit, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the Supreme Court decision in a prior appeal had become the law of the case, and trial court, on retrial, was bound by such ruling.

Reversed.

1. Courts ⟹99(1)

All questions decided on a motion to dismiss an appeal become the law of the case.

2. Appeal and Error ⟹1097(1), 1195(1)

Where questions presented were necessarily involved in former appeal and conclusion arrived at on the former appeal could not have been reached without expressly or impliedly deciding question subsequently presented, decision on former appeal is "law of the case" and rules throughout all subsequent stages of action.

See publication Words and Phrases, for other judicial constructions and definitions of "Law of the Case".

3. Appeal and Error ⟹1203(5)

Where purchaser who sued to rescind contract for purchase of apartment unit in hotel and for purchase price was not awarded judgment, and vendor levied on the apartment unit and disposed of it to third party, and Supreme Court later held that purchaser's appeal would not be dismissed because purchaser could no longer restore the apartment unit to vendor, Supreme Court ruling became the "law of the case" and was binding upon trial court on retrial, and, hence, motion for nonsuit on ground that purchaser could no longer restore apartment to vendor was improperly granted.

Desmond & Desmond and Walter Desmond, Jr., Long Beach, for appellant.

Newton M. Todd and James J. Baker, Long Beach, for respondents.

McCOMB, Justice.

Plaintiff appeals from (1) an order granting defendants' motion for a nonsuit, and (2) the judgment predicated upon the order.

Facts: This cause has previously been before the Supreme Court on appeal in Stock v. Meek, 35 Cal.2d 809, and the facts are thus stated in that opinion beginning at page 811, 221 P.2d 15, at page 16:

> "Plaintiff brought this action to recind the purchase from defendants, hubsand and wife, of space in a cooperatively-owned apartment house and to recover the amount she had paid defendants therefor. Defendants counter-claimed for interest that they had paid plaintiff on a usurious loan.
>
> "Early in 1945 defendants purchased the Palace Apartment Hotel in Long Beach. They intended to sell the forty-six apartments to purchasers on an 'own-your-own' plan. An escrow and trust were set up to convey title to purchasers, to pay expenses, and to distribute any profits. * * *
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> "In a separate transaction, plaintiff purchased a non-residential part of the same apartment house, called 'Space 101' by the parties. She paid defendant Glenn L. Meek $9,000 for the 'exclusive and permanent right of occupancy,' as described in the Certificate of Beneficial Ownership issued by the trustee, Security-First National Bank of Los Angeles. The record does not disclose what use plaintiff intended to make of the space. Plaintiff alleged, however, that defendant had represented to her that the space could be 'used and owned exclusively' after the lobby of the building had been completed, and that she had purchased the space in reliance on this representation. Plaintiff alleged that when the work on the lobby was completed, she discovered that no one could obtain the exclusive and permanent occupancy of

the space because of the building and fire regulations of the City of Long Beach. Plaintiff thereafter gave prompt notice of rescission; she seeks in this action to recover the $9,000 paid. Her complaint also included a common count for $9,000 had and received by defendants for her use and benefit.

"Defendants denied the allegations of the complaint and counter-claimed for the interest or bonus paid on the note. * * *

"Defendants have moved to dismiss the appeal from the judgment in the light of the following events occurring after entry of judgment. Plaintiff gave notice of appeal on June 23, 1948. Plaintiff did not, however, file a bond for stay of execution. Defendants levied execution on property of plaintiff, including her interest in the Palace Apartment Hotel trust representing Space 101 and Apartment 702. * * On or about October 28, 1948, both Space 101 and Apartment 702 were sold by the sheriff at public auction to the highest bidders. Space 101 was purchased by defendant Glenn Meek for $3,000, credited as a partial satisfaction of the judgment. * * *

"After the sale of Space 101 to defendant Glenn Meek on execution, the maintenance charges required of plaintiff by the trust became delinquent. The trustee sold Space 101 at public auction on June 3, 1949, under a power of sale provided by the declaration of trust. Space 101 was again purchased by defendants, who paid a cash consideration not exceeding $1,000. On June 22, 1949, defendants made a bona fide sale of Space 101 for $4,050 to a third person or persons who are now the owners of the space.

"Defendants move to dimiss the appeal on the ground that the questions involved have become moot. Their claim is not, however, that the outcome of the appeal is a matter of indifference to the parties or that consideration and disposition of the case on the merits cannot affect the substantial rights of the parties. They contend that plaintiff has destroyed her cause of action for rescission by her loss of Space 101, which she had offered to restore to defendants at the time she gave notice of rescission."

Question: Did the trial court err in granting a motion for nonsuit upon the ground that plaintiff's cause of action had been destroyed by reason of the fact that subsequent to her notice of rescission of her contract with defendants she had lost the property which she had received from them and thus could not place defendants in status quo?

Yes. These rules are here applicable:

[1] 1. All questions decided on a motion to dismiss an appeal become the law of the case. (Morris Plan Co. v. Kahen, 135 Cal.App. 395, 396[1], 26 P.2d 855.)

[2] 2. Where questions presented on a subsequent appeal were necessarily involved in a former appeal, and the conclusion arrived at on the former appeal could not have been reached without expressly or impliedly deciding the question subsequently presented, the decision on the former appeal is the law of the case and rules throughout all subsequent stages of the action. (Kirman v. Borzage, 89 Cal.App.2d 898, 900[2], 202 P.2d 303. See also cases cited in 1 West's Calif.Dig. (1951) Appeal & Error, 🔑1195(1), page 784.)

[3] In the instant case defendants moved to dismiss the prior appeal (Stock v. Meek, supra, 35 Cal.2d 813[1], 221 P.2d 15) on the very ground upon which the motion for a nonsuit from which the present appeal is taken was predicated. The motion to dismiss the appeal was denied (Stock v. Meek, supra, 35 Cal.2d 815, 221 P.2d 15). Hence it follows that under rule 1, supra, the Supreme Court's ruling became the law of the case, and under rule 2, since the Supreme Court had ruled adversely to defendants' position the trial court was bound on a retrial by such ruling and erred in granting the motion for a nonsuit.

The order and judgment are and each is reversed.

MOORE, P. J., and FOX, J., concur.

114 Cal.App.2d 500

VON ZASTROW et al. v. SCHIFFBAUER.

Civ. 19078.

District Court of Appeal, Second District, Division 2, California.

Dec. 2, 1952.

Rehearing Denied Dec. 18, 1952.

Hearing Denied Jan. 22, 1953.

Action to establish a resulting trust in real property. From a judgment of the Superior Court of Los Angeles County, John J. Ford, J., for plaintiffs, defendant appealed. The District Court of Appeal, McComb, J., held that undisputed evidence that plaintiffs' father, before his death, furnished the entire purchase price of the property and directed conveyance thereof to defendant and his wife, sustained the trial court's finding that grantees held the property in trust for plaintiffs' father, and that the wife's conveyance of her interest therein to defendant before her death, did not deprive plaintiffs' father or his heirs of their rightful title thereto.

Judgment affirmed.

1. Trusts 🔑89(2)

Undisputed evidence that another than grantees of realty furnished entire purchase price paid to grantor therefor and directed conveyance of title to grantees sustained trial court's finding that they held property in trust for purchaser.

2. Trusts 🔑72

Where consideration for conveyance of land is paid by another than grantee, payor may claim and prove that he is beneficial owner of land and that grantee is merely holder of legal title thereto; transaction creating "resulting trust". Civ.Code, § 853.

See publication Words and Phrases, for other judicial constructions and definitions of "Resulting Trust".

3. Trusts 🔑356(1)

The fact that wife conveyed to her husband her interest in real property conveyed to them as directed by purchaser thereof did not deprive such purchaser or his heirs of rightful title to property.

4. Limitation of Actions 🔑103(2, 4)

The statute of limitations does not begin to run against enforcement of resulting trust in realty until trustee repudiates trust and his adverse claim to realty is clearly and unequivocally made known to cestui que trust.

5. Limitation of Actions 🔑103(2)

An action to enforce a resulting trust must be commenced within four years after trustee's repudiation of trust.

6. Limitation of Actions 🔑103(2)

An action instituted on December 16, 1949, to establish resulting trust in realty conveyed to defendant and his wife as directed by plaintiff's father, who furnished grantor entire purchase price thereof, was not barred by four-year statute of limitations, where defendant did not repudiate trust by indicating to plaintiff that property belonged to defendant until February, 1948, after deaths of purchaser and defendant's wife, who conveyed her interest in realty to defendant. Code Civ.Proc. § 337.

7. Appeal and Error 🔑1010(1)

Laches is question for trial court, whose conclusion thereon will not be set aside by appellate court, if supported by substantial evidence.

8. Appeal and Error 🔑1010(1)

In action to establish resulting trust in realty conveyed to defendant and his wife as directed by plaintiff's father, who furnished grantor entire purchase price thereof, where evidence supported trial court's finding that defendant did not repudiate trust by indicating to plaintiff that property belonged to defendant until early part of year before that in which action was instituted, court's finding that plaintiff's claim was not barred by laches was not unreasonable and was supported by substantial evidence.

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Jerry Giesler and Robert A. Neeb, Jr., Beverly Hills, for appellant.

Denio, Hart, Taubman & Simpson by George A. Hart, Long Beach, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs in an action to establish a resulting trust in certain real property, hereinafter known as the Beverly Hills property, defendant appeals.

Facts: On or about January 27, 1934, Hermann Beinssen purchased a piece of real property, having the title thereto placed in the name of his friends, Agnes Schiffbauer and her husband Dr. H. E. Schiffbauer. The entire purchase price was paid by Mr. Beinssen.

Dr. Schiffbauer first learned of the deed with his name on it more than six years after the deed was executed. From the date of the deed until 1939, rents from the property were collected by an agent of Mr. Beinssen. Thereafter Mrs. Schiffbauer collected the rents until her death on July 2, 1940. On April 18, 1940, Mrs. Schiffbauer transferred the property by deed to her husband Dr. Schiffbauer.

After Mrs. Schiffbauer's demise, Dr. Schiffbauer collected the rents, paid all bills, upkeep and expenses on the property and reported the income as his own to the state and federal taxing authorities.

In February or March, 1948, plaintiff Gerda Von Zastrow, who lived in Australia and was the daughter of Hermann Beinssen, came to California to settle her father's estate. At this time she had a conversation with defendant in which he indicated that the real property in question belonged to him. The instant action was filed December 16, 1949.

[1] *Questions:* First: *Was there substantial evidence to sustain the trial court's finding that defendant and his wife held the Beverly Hill's property in trust for Hermann Beinssen?*

Yes. The undisputed evidence establishes that decedent Beinssen furnished the entire purchase price for the Beverly Hills property and directed that it be taken in the name of defendant and his wife.

[2] Such facts make applicable the rule that where a conveyance of land is made to one person and the consideration for the transfer is paid by another, the latter may claim and prove he is the beneficial owner of the real property and the grantee is merely the holder of the legal title. The transaction creates what is known as a "*resulting trust.*" (Currey v. Allen, 34 Cal. 254, 257, Campbell v. Freeman, 99 Cal. 546, 547, 34 P. 113; Civil Code, sec. 853.[1] See also Restatement of Law and Trusts (1935), Vol. II, sec. 440, subd. F., page 1345.)

In view of the foregoing rule and authorities in support thereof, defendant's argument in his brief based upon authorities which deal with "*express trusts*" and "*constructive trusts*" are not here applicable and discussion of the cited cases which pertain to those two types of trusts would serve no useful purpose in solving the problems here presented.

[3] It is likewise evident that the fact that Mrs. Schiffbauer gave a deed to her husband of her interest in the property could not deprive decedent Beinssen nor his heirs of their rightful title to the property.

Second: *Was plaintiffs' cause of action barred by the statute of limitations?*

No. The following pertinent rules are applicable:

[4] 1. In the case of a "*resulting trust*" the statute of limitations does not begin to run until there has been a repudiation of the trust and the adverse claim of the trustee clearly and unequivocably made known to the cestui que trust. (Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 244[2], 196 P. 884.)

[5] 2. To enforce a resulting trust the action must be commenced within four years after the repudiation of the trust. (See cases cited, 16 Cal.Jur.(1924), Limitation of Actions, sec. 84, note 2, page 480.)

[6] Applying the foregoing rules to the facts in the instant case it is apparent the statute of limitations had not run for the reason that the evidence discloses it was

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[1] Section 853 of the Civil Code reads: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

not until February, 1948, that defendant repudiated his trust and the action was instituted December 16, 1949, well within the statutory period.

Third: *Was plaintiffs' claim barred by laches?*

[7] *No.* The question of laches is one for the determination of the trial court and its conclusion thereon will not be set aside by an appellate court if such conclusion finds substantial support in the evidence. (Fabian v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779.)

[8] In the present case there is ample evidence to support the trial court's finding that defendant did not repudiate his trust until the early part of 1948. Hence the trial court's finding that laches had not intervened is not unreasonable and finds substantial support in the evidence.

Affirmed.

MOORE, P. J., and FOX, J., concur.

BROWN v. JENSEN. [*]

Civ. 19201.

District Court of Appeal, Second District,
Division 2, California.

Dec. 5, 1952.

Hearing Granted Feb. 2, 1953.

Action on a promissory note. From a judgment of the Superior Court, Los Angeles County, Thurmond Clarke, J., in favor of the plaintiff, the defendant appealed. The Court of Appeal, Second Appellate District, McComb, J., held that holder of note which had been secured by purchase money second deed of trust was not barred from bringing action on note after security had become valueless because of sale of security by holder of purchase money first deed of trust.

Judgment affirmed.

1. Mortgages 🔑218.1

Holder of note secured by purchase money second deed of trust is not barred from bringing action on note after security has become valueless because of sale of security by holder of purchase money first deed of trust.

2. Mortgages 🔑218.1

Where sale of property under purchase money first deed of trust has rendered second deed of trust valueless as security, holder of note which is secured is not precluded from bringing suit on note by statute prohibiting recovery of deficiency judgments, since action is not one for a deficiency judgment. Code Civ.Proc. § 580b.

Ned P. Eads, Sherman Oaks, for appellant.

Bertram S. Harris, Los Angeles, for respondent.

McCOMB, Justice.

This appeal is from a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the amount due on a promissory note.

Facts: On April 26, 1950, defendant and Leota I. Triplett purchased from plaintiff a parcel of real property situated in the county of Los Angeles. As part of the purchase price defendant and Leota Triplett executed a promissory note in favor of Glendale Federal Savings and Loan Association in the sum of $11,300. As security therefor they signed a first deed of trust naming the savings and loan association as beneficiary. At the same time, and as a part of the purchase price, they signed a promissory note in favor of plaintiff, the vendor of the property, in the sum of $7,200 with interest at the rate of 5% per annum from the date of the note, the principal payable monthly in instalments of $72.00 each on the 15th day of each month beginning June 15, 1950, plus interest. The note also provided for the payment of a reasonable attorney's fee should suit be commenced to enforce payment thereof. As security for this note they signed a second deed of trust upon the property with plaintiff as beneficiary.

On September 15, 1950, plaintiff signed a promissory note in favor of Morris and

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[*] Subsequent opinion 259 P.2d 425.

Rae Comess in the sum of $2,075 with interest at the rate of 10% per annum, payable on or about May 15, 1951. As security for this note plaintiff assigned the above mentioned promissory note in the sum of $7,200 to the Comesses, together with the deed of trust securing it.

No payments were made by defendant or Leota Triplett on account of either promissory note which they had executed, and on November 10, 1950, the Comesses as assignees of the second deed of trust caused notice to be given of default and election to sell the real property under the second deed of trust.

On December 14, 1950, Glendale Federal Savings and Loan Association caused to be given notice of default and election to sell the real property under the first deed of trust.

On April 9, 1951, the real property was sold under a foreclosure of the first deed of trust and the beneficiary purchased the property for the sum of $11,896.63. As a result of this sale the second deed of trust became valueless as security for the note in the sum of $7,200.

Thereafter plaintiff instituted the present action to collect the amount due on the promissory note signed by defendant.

[1] *Question: Is the holder of a note which has been secured by a purchase money second deed of trust barred from bringing action on the note after the security becomes valueless by reason of the sale of the security by the holder of the purchase money first deed of trust?*

No. This identical question was before the court in Hillen v. Soule, 7 Cal.App.2d 45, 45 P.2d 349, and answered contrary to defendant's contention.

[2] Section 580b of the Code of Civil Procedure reads in part as follows:

> "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property. * *"

In answering the contention which defendant here makes, that the foregoing provision of the Code of Civil Procedure barred plaintiff's cause of action, the court in Hillen v. Soule, supra, 7 Cal.App.2d at page 47, 45 P.2d at page 349 said:

> "Appellant first contends that this is an action for a deficiency judgment after a sale under a deed of trust given to secure the balance of the purchase price of real property, and that such action cannot be maintained by reason of the provisions of section 580b of the Code of Civil Procedure. It is a sufficient answer to state that this is not an action for a deficiency judgment. The security was exhausted by the sale under the first deed of trust and no sale was had under respondent's deed of trust. We are therefore of the opinion that the provisions of said section are inapplicable."

Affirmed.

MOORE, P. J., and FOX, J., concur.

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114 Cal.App.2d 452

GOODWILL INDUSTRIES OF SAN BERNARDINO AND RIVERSIDE COUNTIES, Inc. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4477.

District Court of Appeal,
Fourth District, California.

Nov. 26, 1952.

Hearing Denied Jan. 22, 1953.

Proceeding to review award of Industrial Accident Commission. The District Court of Appeal, Nussell, J., held that claimant had a partial permanent disability and impaired capacity to work resulting from a previous non-industrial disease at the time of accident and that the Commission erred in finding that the injury accident caused total disability and in failing to determine and deduct percentage of total disability allowable to claimant's condition at the time of the injury.

Award annulled and matter remanded for new hearing.

1. Workmen's Compensation ⚿604, 845

Industry is to be charged only for those injuries arising out of and in the course of employment and only for result of that particular injury when considered by itself and not in conjunction with or relation to a previous injury.

2. Workmen's Compensation ⚿903

Where at the time of accident claimant had partial permanent disability and impaired capacity to work resulting from a previous nonindustrial disease, the Industrial Accident Commission erred in finding that the accident caused total disability and in failing to determine and deduct percentage of total disability allowable to claimant's condition at time of the injury. Labor Code, §§ 4750, 4751.

3. Workmen's Compensation ⚿845

Industry takes employee as it finds him at the time of employment, and disability or impaired capacity resulting from disease, accident, or habits having no relation to any particular employment are not provided for under the Workmen's Compensation Act. Labor Code, §§ 4750, 4751.

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Herbert S. McCartney, Jr., Los Angeles, for petitioners.

Edmund J. Thomas, Jr., San Francisco, for respondents.

MUSSELL, Justice.

Respondent, Mary M. Harris, aged twenty-five years, while employed as a saleslady by the Goodwill Industries of San Bernadino and Riverside Counties, Inc., on December 12, 1949, at San Bernadino, fell from a short stepladder, landing in a sitting position and striking her right hip.

The Fidelity and Casualty Company of New York was the employer's compensation insurance carrier at the time the accident occurred and both the employer and employee were subject to the provisions of the Workmen's Compensation Insurance and Safety Laws of the State of California.

On December 11, 1950, Mrs. Harris filed an application with the Industrial Accident Commission for adjustment of her claim for injuries sustained, and after several hearings were had thereon, the Commission found that the applicant, on December 12, 1949, sustained injuries arising out of and occurring in the course of her employment, consisting of aggravation of pre-existing, quiescent tuberculosis, resulting in complete paralysis of both legs, resulting in permanent disability; that said injury of December 12th caused temporary total disability beginning two days later and that said injury constitutes permanent disability of 100 percent. An award was made against the Fidelity and Casualty Company of the sum of $16.06 per week beginning December 14, 1949, to and including June 15, 1951, as temporary disability indemnity, together with the sum of $16.06 per week for 400 weeks, as permanent disability indemnity beginning January 23, 1951, and thereafter $9.88 per week for the balance of her life.

Petitioners concede complete paralysis of both legs is a 100 percent disability and that the applicant may be entitled to permanent disability benefits under the provisions of Section 4751 of the Labor Code. However, the Fidelity and Casualty Company claims that if it is liable at all for any of such benefits, it is liable only for the "increase of the factors of disability produced by the tuberculosis of the spine after the percentage of such original factors are properly determined and deducted from the combined disability." The Commission found as a fact "that defendant is not entitled to apportionment of any of the benefits herein allowed."

The principal question to be here decided is whether the findings and award are sufficiently supported by the evidence.

According to the records of the Texas Scottish Rite Hospital for Crippled Children, Mary Harris was born February 28, 1924, and first became seriously ill at the age of three years. Before she was six years old, she was found to have tuberculosis of the spine, with complete destruction of the first lumbar vertebra and kyphosis (forward angulation of the spine) in the lumbo dorsal region. She was placed on a "Girard Frame" and remained on it continuously for three and one-half years, by which time there was fifty percent destruction of the second lumbar vertebra. A back brace was then made for her which she wore, when up, with crutches under both arms. By November, 1933, there was a destruction involvment of the twelfth dorsal vertebra and marked kyphosis. Surgery was performed in which seven vertebra were fused. Subsequent X-Rays, from 1934, to 1942, showed solid fusion but during all of that period she had serious complaints of pain and other symptoms, not only in the area of the kyphos and fusion, but in all areas of her back and both legs. At the age of fifteen applicant lifted something and had disability for approximately two months. In January, 1941, applicant complained of some pain in the lower lumbar area just below the fused area and the X-Ray examination showed two medium sized calcified abscesses on either side of the spine. The reapplication of a heavily stayed corset for a few weeks until the muscles could be rebuilt was recommended and the patient was discharged permanently. The following week applicant was readmitted to the hospital and complained of progressive pain in her back, legs and stomach. She was again put on a frame and on January 24th, a lumbar puncture was made. In September, 1941, she was fitted with a brace and told to return to the hospital in six months. In May, 1942, the fusion area clinically was firm but there was tenderness below the lower level of fusion. The left knee jerk was hypoactive, and other deep reflexes hyperactive. It was then recommended that applicant be transferred to another hospital in Texas for further care.

The applicant stated to a Dr. Crowe (in April, 1950) that following the spinal puncture in 1941 her left leg became paralyzed and was anesthetic as far as the hip so that pins could be stuck through the leg without producing any pain; that this paralysis of the leg lasted for many months; that following her marriage in 1943, she suffered from one therapeutic abortion and two miscarriages and subsequently pelvic surgery because of the fact that it was felt inadvisable for her to have a pregnancy with the severe degree of kyphosis at the region of the old Pott's disease.

Applicant testified that after the surgery in 1944 she did not limp and that she and her husband would go dancing, roller skating, horseback riding, swimming and mountain hiking and that the day preceding the accident, she had been on a mountain hike.

The record shows that Dr. James Carmack first saw Mrs. Harris on December 5, 1949, when she came to him as a private patient. She then recited a long history of trouble with her spine which had required long hospitalization and ultimate surgical fusion, at the age of nine years. She indicated that she recently had been having some slight pain and some numbness involving the left leg and wanted check X-Rays of her spine. The X-Rays were made and the doctor saw her again on December 16th, at which time she complained of a severe pain in her back. She was treated with heat and massage through December and on January 5, 1950, still complained of some pain. The doctor's diagnosis was "low back strain". On February 5, 1950, Dr. Carmack reported that the patient still had symptoms of acute strain and walked with a considerable limp. A plaster jacket was applied and on February 23rd the patient was placed on a Bradford Frame and views of the lumbar spine were taken. These views were interpreted as being negative for evidence of fracture or dislocation. Mrs. Harris reported to Dr. Carmack on May 15th, 25th and June 1st, 1950, and his report, dated June 2nd, states that in his opinion Mrs. Harris, to begin with, had an acute low back sprain and had not recovered from it. Mrs. Harris was then treated regularly by Dr. Carmack until September 14, 1950, and on September 28th, the doctor reported that in view of the patient's past history and in view of the rather minor nature of her injury, he was inclined to feel that he was dealing with some other element than the simple injury itself. He referred Mrs. Harris to Drs. Girard, Loiselle and Payne of Dallas, Texas, and their report, dated September 26, 1950, made after a review of the case and further examination, sets forth the opinion that the condition of the patient was "a flare up of the previous condition secondary to the injury".

Dr. Crowe, an orthopaedic surgeon, stated in his report of April 7, 1950, that he and Dr. Jones examined Mrs. Harris on April 4th and found that she had a constant rythmic kicking of the left lower extremity and the right lower extremity in a position of marked flexion. She was able to turn herself in bed without help and up to the day before, had been walking and getting about without apparent particular difficulty. Dr. Crowe's diagnosis was "old Pott's disease now arrested with severe deformity. No injury. Hysteria," and it was his opinion that Mrs. Harris was a healthy woman and had not been injured in any way by the fall which she had on December 12, 1949.

Dr. Jones, in his report, dated April 10, 1950, stated that Mrs. Harris' past history readily indicated that she had a profound Pott's disease or tuberculosis of the spine from early childhood, with a very marked deformity in her low back throughout all of her adult years and that a review of her recent X-Rays of the spine demonstrated no evidence of activity or any destruction of the vertebra; that there was no satisfactory evidence of any new physical disability other than the old pre-existing tuberculosis of the spine which was apparently fairly well healed and then inactive.

On December 21, 1950, a laminectomy was performed on Mrs. Harris by Dr. Neufield and Dr. Vogle and some tissue was removed. The area of the bone in the region of the kyphos was found to be intact as far as the previous function was concerned. Acid fast stains did not reveal tuberculosis organisms and the diagnosis was "tuberculosis of a vertebra." Dr. Neufield, in his report of April 11, 1951, stated as follows: "It is my opinion that this patient had sufficient evidence at the time that she was seen by us to justify the diagnosis of cord irritation due to the limited dural space, incurred at the time that she fell in a sitting position on December 12, 1949. Had it not been for the angulation at that level I doubt very much that the injury which the patient sustained at that time would have produced the present clinical picture. The tuberculous material in the bodies was sufficiently soft so that a blow, the result of a fall, would be of sufficient severity to produce compression of the cord and possibly aggravate the tuberculous lesion. The aggravation of the tuberculous lesion is presumptive and problematical since there was very little evidence of this at the time of surgery."

Dr. Nickel, in his report of December 7, 1950, stated that he and Dr. Neufield were unable to determine whether the spinal cord involved represented a posttraumatic reactivation of the tuberculous process of the lumbodorsal spine or a posttraumatic mechanical impingement and that they were inclined to believe that there was a posttraumatic mechanical damage to the spinal cord resulting from the accident of December 12, 1949.

Dr. Rand, an independent medical examiner appointed by the referee, in his report of June 15, 1951, after a review of the history of the case and an examination of the patient, gave his opinion as follows: "As near as I can judge, this patient has been a victim of tuberculosis of the spine since about three or four years of age. Under long treatment, together with bone grafting, the condition had apparently become quiescent, so that she was quite active. I think the fall on December 12, 1949, reactivated the tuberculous trouble in her spine, which has lead to a train of symptoms as described above. She is totally disabled at present and as near as I can judge, this disability will continue indefinitely."

Petitioners argue that "Wherever, as here, the previous impairment was to the same part, or parts, of the human body, as later became involved in an industrial injury, the extent of the pre-existing impairment, and the mathematically computed degree of each pre-existing permanent disability, must be deducted from the percentage of all disability in the affected part, or parts, of the body after the second injury;" that if injury was sustained by Mrs. Harris, it was to her back in the precise area where the old tuberculosis of the spine had deformed her; that if the injury had anything at all to do with bringing about the applicant's present condition, it did so only in connection with some form of reactivation of precisely the condition constituting the pre-existing disability and impairment; that if the fall of December 12 caused an aggravation of the old tuberculosis, then all pre-existing, permanently impairing effects of that tuberculosis must be determined and deducted from the new total factors following the injury.

Section 4750 of the Labor Code provides:

> "Permanent injury of employee suffering previous permanent disability or impairment: Compensation for later injury: Liability of employer for combined disability. An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.
>
> "The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

Section 4751 of the same code provides:

> "Injury of employee permanently partially disabled resulting in 70% permanent disability: Compensation. If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article."

[1] In Gardner v. Industrial Accident Comm., 28 Cal.App.2d 682, 83 P.2d 295, this court, in considering an award apportioning disability, stated the general rule to be that industry is to be charged only for those injuries arising out of and in the course of employment and only for the result of that particular injury when considered by itself and not in conjunction with or in relation to a previous injury.

In Edson v. Industrial Accident Comm., 206 Cal. 134, 138–139, 273 P. 572, 573, it is said:

> "The plain intent of the act as framed was to charge the employer, and through him industry as a whole, with the loss accruing to the employee and resulting from his employment—i. e., arising out of and in the course of his employment. If the employee has suffered permanent disability by injury or disease prior to the injury for which compensation is sought, the statute requires that the percentage of disability on account of the latter injury be computed without reference to any injury previously suffered or any permanent disability caused thereby, except that in the case of aggravation of a pre-existing disease such proportion of the disability due to the aggravation of the prior disease as may be reasonably attributed to the later injury may be considered."

In Wolski v. Industrial Accident Comm., 70 Cal.App.2d 427, 161 P.2d 283, the court, in construing section 4750, supra, in a case where the employee who had an impaired and defective left eye since childhood lost the sight of his right eye in an industrial accident, held that the petitioner was, prior to the injury to his right eye, "suffering from a previous permanent disability or physical impairment" within the meaning of section 4750 of the Labor Code and that his employers were liable to him only for that portion of his disability due to the injury to his right eye as though no impairment to the left eye had existed.

In Tanenbaum v. Industrial Accident Comm., 4 Cal.2d 615, at page 618, 52 P.2d 215, at page 216, the court, in considering the question of apportionment, said:

> "As we read the record in this proceeding, the petitioner is now suffering from a disability made up in part of an industrial disability growing out of the injury, including the aggravation or 'lighting up' of the pre-existing dormant arthritic condition, and, in part, though in a lesser degree, of what may be termed a nonindustrial disability resulting from the normal progress of the pre-existing arthritis. Obviously, the latter disability is not attributable to industry and should not be saddled thereon."

In Colonial Ins. Co. v. Industrial Accident Comm., 29 Cal.2d 79, 83–84, 172 P.2d 884, 887, the court states the rule to be that "an employer takes the employee as he finds him at the time of employment and when subsequent injury lightens up or aggravates a previously existing condition rendering it disabling, liability for the full disability without proration is imposed upon the employer." (Citing cases.) The court then goes on to say:

> "It is true that in those cases the disability was apportioned according to the extent it was caused by the pre-existing condition and the industrial injury, but there the prior condition had already resulted in a partial disability which was not attributable to his employment while in progressive occupational disease cases the disease is being contracted and accumulated during various employments."

In Industrial Indemnity Co. v. Industrial Accident Comm., 95 Cal.App.2d 443, 450, 213 P.2d 11, 15, the court said:

> "It was a question of fact for the determination of the commission as to whether applicant's permanent disability resulted from the effects of the accident, including the aggravating effect of the accident upon a pre-existing disease, or whether the disability or a part thereof resulted from the normal progress of a pre-existing disease. If a part of the disability resulted from the normal progress of a pre-existing disease then a portion of the permanent disability rating herein should have been attributed to the pre-existing disease. The question therefore is whether there was substantial evidence to support the determination of the Commission that there should be no apportionment."

[2] In the instant case the evidence conclusively shows that Mrs. Harris, from early childhood, suffered from tuberculosis of the spine, with destruction of the first vertebra and a forward angulation of the spine. In 1933, when she was about nine years old, surgery was performed in which seven vertebra were fused. During the period beginning with the surgery and until 1942, she had pain and other symptoms, not only in the area of the kyphos and the fusion, but also in her back and legs. She stated to Dr. Crowe that following a spinal puncture in 1941, her left leg became paralyzed and that this paralysis of the leg lasted for several months. It is true that she worked for Goodwill Industries, a corporation employing physically handicapped persons, for several months. However, we conclude that at the time of the accident on December 12, 1949, Mrs. Harris had a partial permanent disability and impaired capacity to work resulting from a previous nonindustrial disease. There is no substantial evidence in the record to the contrary. Under such circumstances, the Commission erred in finding that the injury of December 12th caused total disability and in failing to determine and deduct the percentage of total disability allowable to applicant's condition at the time of the injury.

[3] As was said in Edson v. Industrial Accident Comm., supra, 206 Cal. at page 138, 273 P. at page 573:

> "Industry takes the employee as it finds him at the time of the employ-

ment. He may have suffered a prior injury, either industrial or nonindustrial. His capacity to serve may have been reduced by an industrial or a nonindustrial disease. It may safely be said that a small proportion of humans are perfect physically and mentally. Disease and accident during childhood and the diseases and habits of adults having no relation to any particular employment result in disability or impaired capacity to work in the sphere of both physical and mental labor. For such disability or impaired capacity the Workmen's Compensation Act was not intended to provide compensation."

In view of what we have here said, it is unnecessary to pass upon the question of whether the Subsequent Injuries Fund should have been joined as a party defendant.

For the reasons given, the award is annulled and the matter is remanded for a new hearing.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

114 Cal.App.2d 510

NORBY v. PISTER et al.

Civ. 4450.

District Court of Appeal, Fourth District, California.

Dec. 2, 1952.

Action to cancel contract of sale of realty and recover sums paid on purchase price and in caring for the property. The Superior Court of Orange County, Kenneth E. Morrison, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that grant deed executed and delivered pursuant to contract, being unconditional and without fraud in its inception, was not subject to rescission on ground of failure of consideration.

Judgment affirmed.

1. Deeds 🔑19

A grant deed, which was unconditional and without fraud in its inception, conveyed title to realty and was not subject to rescission on ground of a failure of consideration.

2. Deeds 🔑19

Acts done after delivery of deed cannot affect its integrity and subsequent breach of personal covenants not amounting to a condition will not avoid deed, in absence of fraud or false representation.

3. Deeds 🔑19

Statute allowing rescission of contracts for failure of consideration does not apply to executed conveyance, where actual performance by grantee is not required as a condition.

4. Deeds 🔑19

Provision in escrow agreement for sale of realty by which vendor agreed to install pipe lines for irrigation and domestic purposes did not make installation of such pipe lines a condition of transfer of title, and hence after execution and delivery of grant deed, purchaser's only remedy for failure of vendor to perform agreement was by action for damages for breach of contract.

5. Vendor and Purchaser 🔑343(1)

Vendor was not liable in damages for breach of provision in escrow agreement for sale of realty by which vendor agreed to install pipe line for domestic purposes, where vendor was ready, willing and able to install pipe line but was prevented from doing so by failure of purchaser to obtain requisite consent from city for connection of pipe line with city water system.

Powell & Banyard, Santa Ana, for appellant.

Mize, Kroese, Larsh & Mize, Santa Ana, for respondents.

MUSSELL, Justice.

This is an action to cancel a contract of sale of real property in Orange County all documents in connection therewith, and for a judgment in the sums paid by plaintiff on the purchase price and in caring for the property. Judgment was entered in favor of defendant and plaintiff appeals.

On May 5, 1947, plaintiff and defendants entered into a written escrow agreement in which plaintiff agreed to purchase and defendants agreed to sell the property described therein (approximately two acres) for the total purchase price of $6,500, $3,000 to be paid in cash and the balance by promissory note secured by trust deed. The escrow agreement contained the following provision: "Seller agrees to install and pay for pipe lines for irrigation and domestic purposes." On May 19, 1947, defendants executed and delivered a grant deed to said property to plaintiff. Defendants received the sum of $3,000 through escrow and plaintiff executed and delivered to defendants his promissory note in the sum of $3,500, secured by a trust deed on the property. Shortly thereafter, defendants installed the irrigation pipe lines mentioned in the agreement. The domestic pipe lines were not installed by reason of the failure of plaintiff to secure an agreement with the city of Orange, which was required before pipe lines could be connected with the city water system or domestic water furnished.

On or about December 5, 1949, plaintiff served on defendants a notice of rescission of the escrow agreement stating that defendants had failed to install and pay for the pipe lines for domestic purposes and that the consideration for the agreement had failed in whole or in part. A deed was therein tendered to defendants and demand was made for the return of moneys paid on the contract, plus $448.66 which plaintiff asserted he had spent in caring for and preserving the property.

Plaintiff contends (1) That there was a material failure of consideration because the defendants did not install and pay for the domestic pipe line and that there should be a rescission of the contract; and (2) That in the event it is determined that plaintiff is not entitled to a rescission of the contract, then the court should fix and determine the amount of damages to which plaintiff is entitled. These contentions are both without merit.

[1–3] The grant deed from defendants to plaintiff covering the property involved was unconditional, unaffected by fraud in its inception, conveyed title, and is not subject to rescission on account of a failure of consideration. Borden v. Boyvin, 55 Cal.App.2d 432, 436, 130 P.2d 718; Abel v. O'Hearn, 97 Cal.App.2d 747, 758, 218 P.2d 827; Williams v. Reich, 123 Cal. App. 128, 131, 10 P.2d 1030. As was said in Lavely v. Nonemaker, 212 Cal. 380, 383, 298 P. 976, 977:

> "It is settled that a deed without fraud in its inception conveys the title, and is not void for any failure of consideration, either in whole or in part. Tillaux v. Tillaux, 115 Cal. 663, 667, 668, 47 P. 691. Acts done subsequent to the execution and delivery of a deed cannot affect its integrity, and a subsequent failure of consideration or breach of a personal covenant not amounting to a condition, will not avoid the deed, if there was no fraud or false representation. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29; Duckworth v. Watsonville Water, etc., Co., 170 Cal. 425, 434, 150 P. 58; Masero v. Bessolo, 87 Cal.App. 262, 271, 262 P. 61. Section 1689 of the Civil Code providing for the rescission of contracts for failure of consideration is without application to an executed conveyance, such as we have here, where actual performance by the grantee is not required as a condition. Lawrence v. Gayetty, supra."

[4] Where, as here, the installation of the pipe lines was not made a condition of transfer of title, plaintiff's remedy, if any, was an action for damages for breach of contract. Johnson v. Clark, 7 Cal.2d 529, 533, 61 P.2d 767.

[5] The trial court found that the defendants were at all times ready, willing

and able to install and pay for the pipe line herein involved; that it was not true that the quoted provision in the escrow agreement relative to said pipe line was a condition for the execution of the grant deed from defendants to plaintiff; that it was not true that the plaintiff paid the purchase price relying on a condition; and that it is not true that defendants refused to install and pay for a pipe line for domestic purposes. The court further found that plaintiff failed to obtain the requisite consent from the city of Orange before said pipe lines could legally be installed and connected to the city line. These findings are amply supported by substantial evidence and the judgment based thereon cannot here be disturbed.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

PEOPLE ex rel. SKELLY v. CITY OF GLENDALE.*

Civ. 19260.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1952.

Hearing Granted Jan. 22, 1953.

Action in quo warranto to contest proceedings annexing certain districts to municipal corporation. The Superior Court, Los Angeles County, Daniel N. Stevens, J., gave judgment for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that publication of official notice of annexation proceedings was made in compliance with statutory requirements.

Affirmed.

1. Municipal Corporations 🔑34

Where notices of annexation elections were published in a weekly newspaper of general circulation published outside the municipal corporation but within the county in which the municipal corporation and annexation districts were located on four consecutive Thursdays next preceding a Tuesday election, publication met the statutory requirements, although 28 days did not elapse between first notice and election. Government Code, § 35123.

2. Courts 🔑91(1)

Supreme Court decision involving almost identical statutory language and similar facts was controlling upon District Court of Appeal.

Edmund G. Brown, Atty. Gen., Kenny & Morris, Edward J. Skelly, by Robert W. Kenny, Los Angeles, for appellant.

Henry McClernan, City Atty., Jahn H. Lauten, Asst. City Atty., Glendale, O'Melveny & Myers, James L. Beebe, Sidney H. Wall, Bennett W. Priest, Special Counsel, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendant holding valid proceedings annexing certain districts in the Crescenta Valley to the corporate city of Glendale.

Facts:

i. On Saturday, November 10, 1951, defendant city council ordered special annexation elections to be held on Tuesday, December 11, 1951.

ii. Notice of the special elections was first published on Thursday, November 15, 1951, in the Crescenta Valley Ledger. The notice was again published on Thursday, November 22, 1951, Thursday, November 29, 1951, and the final publication occurred on Thursday, December 6, 1951.

iii. The elections were held on the date previously set, Tuesday, December, 11, 1951, and the annexation was carried by a close vote in each of the three districts.

iv. Formal proceedings for the annexation were completed on January 28, 1952, and leave to sue having been granted by the Attorney General, the present action in quo warranto was commenced on February 4, 1952.

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* Subsequent opinion 250 P.2d 635.

Question: Was the publication of the official notice of the three annexation proceedings made in compliance with the provision of the Government Code, Section 35123?

Yes. Section 35123 of the Government Code reads as follows:

> "*Publication or posting notice of election.* The city legislative body shall cause notice of the election to be published at least once a week for the four weeks prior to the election, in a newspaper of general circulation, printed and published outside the city, but in the county in which the territory is situated, or if there is none, by posting it at least four weeks next preceding the election in three public places within the territory."

The notices of the three elections were published in a weekly newspaper of general circulation published in an area not in the City of Glendale but within the county of Los Angeles, and actually within the annexation district. The notices were published on the four Thursdays, November 15, 22, 29, and December 6, 1951, next preceding the elections held on Tuesday, December 11, 1951.

[1] The notices were thus published once in each of the four consecutive weeks prior to the elections, whether those weeks be considered as calendar weeks running from Sunday through Saturday, or whether they be considered as periods of seven days each next preceding the elections on Tuesday, December 11, 1951. Nothing more is required by section 35123 of the Government Code.

Plaintiff's contention that "a required publication for four weeks has been consistently construed to mean that 28 days must elapse between the date of first publication and the event concerning which notice is being given," has application to code provisions similar to section 413 of the Code of Civil Procedure, wherein language is used providing that publication shall be "at least once each calendar week" and "must not be less than two months," and do not have application to wording such as is used in section 35123 of the Government Code.

[2] Language almost identical with that in this section was construed by the Supreme Court of California in City of Lindsay v. Mack (1911), 160 Cal. 647, 117 P. 924, wherein it was held that publication similar to that which took place in the instant case was a sufficient compliance with the statute. Such decision is controlling here. (Cf. Fostler v. City of Los Angeles, 179 Cal. 263, 264, 176 P. 138; County of Sonoma v. Sanborn, 1 Cal.App.2d 26, 32, 36 P.2d 419.

County of Los Angeles v. Payne (1927), 82 Cal.App. 210, 255 P. 281 and Reclamation District No. 765 v. McPhee (190), 13 Cal.App. 382, 109 P. 1106, 1107, are not here in point for the reason that neither of the cases dealt with a statutory requirement for publication of notice of election. Both involved the publication of notices of hearings on petitions for the formation of a district which notices were required in order to give jurisdiction to the Board of Supervisors to hear the petitions. In addition the statute involved in Reclamation District No. 765 v. McPhee, supra, provided for publication "for four weeks next preceding the hearing" and did not state, as in the instant case, that the publication should be once a week.

In view of the ruling of our Supreme Court which is directly in point no useful purpose would be served by further discussion of cases cited by plaintiff.

Affirmed.

MOORE, P. J., and FOX, J., concur.

In re HAMAKER'S ESTATE.
ABRAHAMS v. HAMAKER et al.
Civ. 4443.

District Court of Appeal,
Fourth District, California.
Dec. 3, 1952.
Rehearing Denied Dec. 19, 1952.
Hearing Denied Jan. 22, 1953.

Proceeding to vacate prior order approving final account and decreeing distribution and to require executor to account for one-half of proceeds for sale of stock left with executor by testatrix. The Superior Court of Orange County, Kenneth E. Morrison and Raymond Thompson, JJ., entered order that executor should be surcharged and executor appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain findings that testatrix' signature to documents entitling executor to one-half of the proceeds was obtained by use of undue influence and that executor was indebted to the estate in that amount.

Orders affirmed.

1. Executors and Administrators ⚷509(1), 510(9)

In application for order vacating prior order approving final account and decreeing distribution, the court has a wide discretion, and burden is upon appellant to show abuse thereof, and order granting such relief is favored where the circumstances indicate that justice has been served. Code Civ.Proc. § 473.

2. Executors and Administrators ⚷510(7)

Where order signed in open court disclosed that application to vacate prior order approving final account and decreeing distribution had been presented and that court had read it and ordered hearing thereon, and court's minutes showed that application had been specifically brought to court's attention, court's jurisdiction to decide the matter sufficiently appeared, as against contention that court was not "orally moved" within six months, the application having been filed on last day of the six months' period. Code Civ.Proc. § 473.

3. Attorney and Client ⚷124

Where confidential relationship existed between testatrix and her executor, presumption of invalidity existed concerning transaction wherein testatrix turned over her stock to executor for sale and retention of part of proceeds as payments for past legal services, and such presumption could be rebutted only by clear evidence that the transaction was fair and equitable, that testatrix was fully informed on matters involved, that she acted voluntarily, and that no advantage had been taken of the confidential relationship. Code Civ. Proc. § 473.

4. Executors and Administrators ⚷509(8)

In proceeding to vacate prior order approving final account and decreeing distribution and to require executor to account for one-half of proceeds of sale of stock left with executor by testatrix, evidence sustained findings that testatrix' signature to documents which gave executor right to one-half of the proceeds was obtained by use of undue influence, and that executor was indebted to the estate in that amount. Code Civ.Proc. § 473.

◆

Paul Barksdale d'Orr, Los Angeles, Powell & Banyard, Santa Ana, for appellant.

George W. Trammell and Kenneth A. Davis, Long Beach, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order vacating a prior order approving a final account and decreeing distribution, and from an order requiring the executor to account for certain assets.

The appellant Abrahams and Frank H. Love are attorneys sharing an office in Los Angeles, and frequently associated in legal matters. Over a period of many years they had represented Mr. and Mrs. Hamaker, who lived at Santa Ana. In 1936, Love represented Mr. Hamaker in bankruptcy proceedings, later Mrs. Hamaker went through similar proceedings, and Abrahams advised both of them in connection therewith. Abrahams did not appear as a creditor in either proceeding, but Mr. Hamaker's petition listed a money demand for $3250 against Abrahams. In

1943, a creditor sought to reopen these bankruptcy proceedings on the ground that certain assets had been concealed. The lower court decided adversely to the Hamakers and Abrahams secured a reversal of that decision on appeal. Shortly thereafter, the Hamakers deeded certain land to Love which Love sold for between $7000 and $8000. Abrahams testified that this deed was given to Love as a payment on his fee, and that the Hamakers had previously offered to deed the land to him. Abrahams continued to render some service to the Hamakers, but made no charges and received no compensation.

Mrs. Hamaker became seriously ill in 1947, it being recognized in September that she had an incurable cancer. She saw her doctor every two or three days after Christmas, 1947, her condition kept declining, and after January 19, 1948, she was given opiates frequently and as much as twice daily. Mr. Hamaker died early in December, 1947. Mrs. Hamaker was appointed executrix of his will but resigned a couple of weeks later due to her health, and Abrahams was appointed administrator with the will annexed and Love acted as his attorney.

On December 11, 1947, Mrs. Hamaker came to their office and after talking with Love handed Abrahams certificates she owned for 500 shares of stock in the Standard Oil Company of California. Mr. Abrahams gave her a signed receipt stating that this stock was left with him for sale and that he agreed to pay to Mrs. Hamaker "when received, the proceeds from such sale." On January 10, 1948, Mrs. Hamaker executed a will in which she bequeathed $15,000 in cash to Abrahams "in lieu of any claim for attorney's fees, Mr. Abrahams may have, for services rendered to my husband and me over the past years." On the same day, January 10, Love went to Mrs. Hamaker's home in Santa Ana and secured her signature to a paper which he wrote out in longhand. This paper merely stated that Mrs. Hamaker thereby assigned to Abrahams these shares of Standard Oil stock, with full authority to transfer or sell any or all of them. The paper said nothing about what was to be done with the proceeds. On February 2, 1948, Love again went to Mrs. Hamaker's home and secured her signature to another paper which he wrote out in longhand. This paper stated that on January 10, she had assigned these shares of stock to Abrahams; that in accordance with an oral agreement she had made with Abrahams and Love she authorized Abrahams to do anything he wished in his "uncontrolled discretion" to reduce the stock to cash; that when this was done Abrahams and Love should retain one-half of the proceeds "as your fee in the matter you handled for Mr. Hamaker and me and in this matter"; and that Abrahams was to pay the other half of the proceeds to Rex Hamaker and Leonard Hamaker, the respondents here.

On February 21, 1948, Mrs. Hamaker executed a new will and the will of January 10 was destroyed. Except for a slight change which is not material here, the new will was identical with the will of January 10 and contained the same bequest of $15,000 to Abrahams, in lieu of any claim for attorney's fees over the years. Mrs. Hamaker died on March 4, 1948. Mr. Abrahams was appointed executor of her will, and Love acted as his attorney. On June 3, 1949, the court entered an order approving the final account and decreeing distribution.

On December 2, 1949, these respondents, who were the residuary legatees under Mrs. Hamaker's will, filed an application under Section 473 of the Code of Civil Procedure for an order vacating the order and decree which had been entered on June 3, 1949, and permitting the applicants to file exceptions to the account and petition for distribution, together with an affidavit of merits and the proposed exceptions. This application alleged, among other things, that Abrahams had acted as attorney for both Mr. and Mrs. Hamaker for many years; that at the time of Mrs. Hamaker's death he was acting as her attorney and as administrator of her husband's estate; that Mrs. Hamaker was the owner of this Standard Oil stock, and these shares were a part of her estate; that in his final account Abrahams had failed to account for the proceeds of this stock; that Abrahams had told these applicants that it was not necessary for them to be present or to be represented; that at all times mentioned here one of these applicants was and has been a resident of Texas; that they had no knowledge of the inventory or final account until after that account was approved; that thereafter Abrahams forwarded to them checks purporting to represent their shares of the estate, which did not check out with the assets of the estate as they knew them to be; that they requested further information from Abrahams; that after they received a copy of the inventory and the final account they arranged to have auditors check the records of the estate; that the auditors were delayed by the absence of the bookkeeper for Abrahams; that the audit disclosed that this stock had been sold and only one-half of the proceeds had been accounted for in the estate; that on receiving this audit they entered into negotiations with Abrahams in an effort to have this matter corrected; that on the refusal of Abrahams to make any correction or account for these proceeds they retained attorneys to investigate and to advise them as to their legal rights; and that this investigation was diligently carried on but it was not until December 1, 1949, that their attorneys were able to complete their investigation and advise the applicants as to their rights. The exceptions to the final account raised the issue as to whether Abrahams had accounted to the estate for the proceeds from this stock. It appears that Abrahams had had this stock transferred to his name on January 30, 1948, and that on March 1, 1948, he sold the stock for $28,810.41, that he turned into the estate $14,617.72, and that he retained $14,192.69, giving half of that amount to Love.

On December 2, 1949, the judge signed "in open court" an order for hearing of the "application under Section 473 C.C.P." This order recited that the application for an order vacating these previous orders and permitting the applicants to file exceptions to those matters "having been presented to this court, and the court having read the same, and good cause appearing therefor," it was thereby ordered that the hearing on said petition was set for December 23, 1949, and that ten days' notice of said hearing be given. On the same day, December 2, a minute order was entered reciting that the application under 473 "being specifically brought to the attention of the court, and upon showing made" the court had fixed December 23, 1949, for a hearing thereon. This hearing was continued to April 25, 1950, at which time the court entered an order granting the petition, vacating and setting aside the previous order in question, and permitting the applicants to file the exceptions to the final account and petition for distribution. This order further provided that by stipulation the exceptions filed with the application should be deemed to be filed as and for the exceptions to the final account, report of executor and petition for distribution.

A hearing on the exceptions was later had and on June 8, 1951, the court filed its findings of fact. Briefly stated, it was therein found that the deceased owned these shares of Standard Oil stock; that on December 11, 1947, she delivered this stock to Abrahams with instructions to sell the stock and pay the proceeds to her; that Abrahams sold the stock on or about March 1, 1948, for $28,810.41, but did not pay to her or account to her for any part thereof; that he accounted to her estate for $14,617.72 from said proceeds but has wrongfully failed and refused to account for the remainder; that Abrahams personally, and through his associate Love, caused the decedent to sign the documents relating to this stock on January 10 and February 2, 1948, for which there was no consideration; that Abrahams and Love were then acting as legal counsel for Mrs. Hamaker, and also as administrator and attorney for her husband's estate; that at all times after December 6, 1947, Mrs. Hamaker was suffering from cancer in its terminal stages, was in great pain, and her mental capacity was seriously impaired; that from January 1, 1948, to her death she was almost constantly under the influence of strong narcotics; that Abrahams and Love induced her to sign the instruments of January 10 and February 2 by falsely representing to her that she and her predeceased husband were indebted to them in a substantial amount; that these documents were secured from the deceased by the undue influence of Abrahams and Love; that from the proceeds of the sale of the stock Abrahams had wrongfully paid $7096.35 to Love; that Love was not, and is not, entitled to said sum or any part thereof; that Abrahams was at all times fully cognizant of all the facts referred to, but has failed as executor to take any steps to collect this sum from Love; and that said amount has at all times been collectible from Love. As conclusions of law it was found that the previous account should be disallowed; that Abrahams is indebted to the estate in the sum of $14,192.69 with interest from March 1, 1948; that he should be surcharged with that amount; and that he should forthwith file an amended account in which he surcharges himself with this sum with interest. An order and decree was entered accordingly, and Abrahams has appealed from that order and from the order vacating the prior order settling the final account.

[1] The appellant first contends that the court was without jurisdiction to entertain the application of the respondents to set aside the previous order, and for permission to file exceptions to the account. It is first argued that this application was not one for relief from disability arising out of surprise or excusable neglect under Section 473; that it failed to show "probative facts" showing surprise or excusable neglect; that there was no allegation of a failure to receive all notices required by law; that the parties knew the situation, as shown by their statement that when they received the decree of distribution they found that it did not check with the assets of the estate "as they knew them to be"; that the application was addressed to the idea that the executor should be held to account for certain property and not to the object of securing relief from disability; that the application did not directly pray for relief from any excusable fault; and that there was no sufficient showing of diligence on the part of the applicants. These contentions require no extended discussion. The application filed was headed as an application under Section 473, and alleged facts sufficient for that purpose. The court had a wide discretion in the matter and the burden is on the appellant to show an abuse of such discretion. Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244. An order granting such relief is favored where the circumstances indicate that justice has been served. Karlein v. Karlein, 103 Cal.App.2d 496, 229 P.2d 831.

[2] It is also argued in this connection that this application was filed on the last day of the six months' period, and that the court was without jurisdiction to entertain it because the court was not "orally moved" to grant such relief within six months from the date of the judgment. It is argued that while the order fixing time for hearing recites that the application had been presented to the court and the court had read the same, it appears that the court got its information from reading the application and the affidavit of merits and not from any oral motion that relief be granted under Section 473. The appellant relies on such cases as Jones v. Superior Court, 78 Cal.App. 163, 248 P. 292; Colthurst v. Harris, 97 Cal.App. 430, 275 P. 868; and Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, in which it was held, in effect, that giving notice of an application is not the same as making an application, and that some oral request must be made within the six months' period. While it has been held many times that the mere filing of a notice of intention to make such a motion at a time subsequent to the expiration of the statutory period is not sufficient, it has also been held that it is sufficient if the action of the court is invoked in some appropriate manner before the prescribed period has expired. Estate of Grivel, 208 Cal. 77, 280 P. 122. In this case, an order was signed by the judge in open court disclosing that this application had been presented to the court; that the court had read it; that the court considered good cause had been shown; and that the court ordered a hearing on the matter. The minutes of the court also show that this application had been specifically brought to the attention

of the court and that upon the showing made the court had fixed a date for the hearing. It clearly appears that the court acted within its jurisdiction in hearing and deciding this matter.

[3, 4] Appellant further contends that there is neither any evidence nor any presumption which would sustain the findings or judgment to the effect that he exercised any undue influence or took any advantage of Mrs. Hamaker; that the confidential relation of attorney and client, standing alone, is not enough; and that it appears without conflict that Mrs. Hamaker turned over the stock to him on December 11, 1947, and thereafter "ratified and renewed" that transaction in writing, as shown by the papers she executed on January 10 and February 2, 1948. It is argued that half of the stock was turned over to Abrahams in payment for past legal services; that he was not present when the documents of January 10 and February 2 were executed; that he carefully refrained from being present when the wills were executed; and that while a confidential relation appears there is nothing to show any "activity" on the part of Abrahams, or that he took any unfair advantage of Mrs. Hamaker, getting something he did not deserve, through falsely persuading her that she owed him money. It is further argued that because of her repeated confirmatory acts Mrs. Hamaker would have had, at the time of her death, no cause of action to set aside this payment of attorney's fees, and that it follows that the respondents can be in no better position.

The facts in this case should be a sufficient answer to these arguments. McDonald v. Hewlett, 102 Cal.App.2d 680, 228 P.2d 83, 24 A.L.R.2d 1281. A confidential relationship existed as between attorney and client; the appellant was administrator of the husband's estate and later acted as executor of the wife's estate; and he was working with Love throughout all the proceedings here involved. There was a presumption of invalidity in connection with this transaction which, while rebuttable, could only be overcome by clear and satisfactory evidence that the transaction was fair and equitable, that Mrs. Hamaker was fully informed as to all matters involved, that she acted voluntarily and of her own free will, and that no advantage had been taken of the confidential relationship which existed. Roberts v. Wachter, 104 Cal.App.2d 271, 231 P.2d 534.

The appellant testified that he had acted as attorney for Mr. and Mrs. Hamaker over many years out of friendship, that he made no charges, and that he did not expect to be paid. He first testified that on December 11, 1947, Mrs. Hamaker left the Standard Oil stock with him for the purpose of selling it and paying the proceeds to her. He later testified that at that time she told him that she had discussed with Love the fees she and her husband owed him, and had told Love she was going to have Abrahams sell this stock and keep half of the proceeds to pay their fees. Abrahams knew of the wills which Love had prepared, leaving $15,000 to Abrahams in payment of all fees for past services. The wording of that provision of the will clearly shows matters which never would have originated in the mind of Mrs. Hamaker. The evidence shows, without conflict, that Mrs. Hamaker was in a very bad physical condition throughout this period; that she was under opiates a large part of the time, which affected her mental powers; and that in between opiates she could remember some things but was not in good mental condition, and at times could not recognize her doctor. When Mrs. Hamaker handed the stock to Abrahams on December 11 he gave her a receipt showing that he was to sell the stock and pay the proceeds to her. The paper which Love secured on January 10 confirmed the fact that the stock had been assigned, but made no mention of what was to be done with the proceeds. Another paper was secured on February 2 which, for the first time, said anything about Abrahams keeping part of the proceeds. Even that document directed Abrahams to pay the rest of the proceeds to these respondents, which was never done. The doctor testified that he was called on the morning of February 2 because Mrs. Hamaker had had such a bad night and was in a bad condition; that when he arrived at her home the nurse told him that her lawyer was with her; and that he returned later and gave her opiates to relieve her suffering.

The main contentions, with respect to the sufficiency of the evidence, are that Mrs. Hamaker turned the stock over to appellant on December 11 with the intention that he sell it and retain one-half of the proceeds, in payment for his past services; that no attack is made on that original transaction of December 11; that she completely ratified and confirmed that transaction by the papers she signed on January 10 and February 2; and that there is nothing to show that he exercised any undue influence, or to indicate that he did anything to gain any advantage over her.

The appellant testified that his services in the bankruptcy matters were worth $10,000, and he was unable to remember any specific services other than in that connection. Shortly after the bankruptcy matter was concluded, the Hamakers made a payment for legal services in that connection by turning over land worth some $8000, the deed being taken in Love's name. Some years later the transaction here in question occurred. No attack is made on the "original transaction of December 11, 1947", since the appellant then agreed in writing to take the stock for sale and to pay Mrs. Hamaker the proceeds when received. He never complied with that written agreement, and if the papers signed by Mrs. Hamaker on January 10, and February 2 were a ratification of that agreement, they were confirming something different from what the appellant is now contending. The only reasonable inference from the evidence is that Abrahams and Love were working closely together throughout the entire matter here in question. After December 11 Mrs. Hamaker's physical and mental condition rapidly deteriorated. Love went to her home and got her to sign the paper on January 10, which added nothing to the transaction of December 11, other than to give apparent authority for him to transfer the stock into his own name. Abrahams had the stock transferred to his own name on January 30, and on February 2, a day she was in bad condition, Love went to her home and had her sign another paper, with quite a different effect. Even then, Abrahams waited until three days before she died before he sold the stock, and then failed to carry out her instructions. During this same period Mrs. Hamaker had executed a will, witnessed by Love, which gave Abrahams $15,000 "in lieu of any claim for attorney fees" he might have for services to her or to her deceased husband. It is unthinkable that Mrs. Hamaker intended to give Abrahams $15,000 in full payment for all past services, as provided in the will, and at about the same time to give him practically the same amount for the same purpose from the sale of the stock, especially when about $8000 had already and long before been paid for services in the bankruptcy proceedings, the only specific services relied on.

The evidence, with the inferences which may reasonably be drawn therefrom, fully supports the findings to the effect that Mrs. Hamaker's signature to these documents was obtained by the use of undue influence; that advantage had been taken of her physical and mental condition; that she would not have turned this part of the proceeds from the sale of the stock over to the appellant of her own free will; and that the appellant is indebted to the estate in that amount and should be required to account therefor.

The only other point raised is that the court was without power to determine that Love, who is not a party to the proceeding, had overreached Mrs. Hamaker, or to make a finding that he was indebted to the estate in the sum of $7096.35, or "to saddle Abrahams, in the judgment with Love's supposed debt." While the court found, among other things, that Love had been paid $7096.35 from the proceeds of the stock, that he was not entitled to that amount or any part thereof, that he is indebted to the estate in that amount, and that this amount was at all times collectible from him, these findings were appropriate for the purpose of showing that Abrahams, as executor, had not performed his duty and was chargeable with the full amount of the part of the proceeds which he had not accounted for. No judgment was entered against Love and these findings, with the other findings, were merely to the effect that Abrahams had failed to account for a certain amount, was indebted to the estate to that extent, and should be required to account therefor. This was true irrespective of whether or not he had turned over any of the money to Love. He was not "saddled" with Love's supposed debt, but was merely held to account for his own delinquency.

The orders appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, SCHAUER, and SPENCE, JJ., dissenting.

114 Cal.App.2d 603

HENRY et al. v. CITY OF LOS ANGELES et al.

Civ. 19092.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1952.

Rehearing Denied Dec. 23, 1952.

Hearing Denied Feb. 2, 1953.

Wrongful death action against a city and supervisory police officers for shooting of plaintiffs' son by patrolman. On defendants' demurrers, the Superior Court, Los Angeles County, Julius V. Patrosso, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that such an action would not lie against the city and held that in absence of allegations that a verified claim had been presented to the police officers, the action would not lie against such officers.

Affirmed.

1. Municipal Corporations 🔑745½

A municipal corporation is not liable in absence of special statute for torts of its agents in performance of governmental, as distinguished from proprietary, functions. Government Code § 1981.

2. Municipal Corporations 🔑747(3)

Maintenance and operation of police department is a "governmental function". Government Code, § 1981.

See publication Words and Phrases, for other judicial constructions and definitions of "Governmental Function".

3. Municipal Corporations 🔑747(3)

City was not liable for shooting of plaintiffs' son by patrolman. Government Code, § 1981.

4. Municipal Corporations 🔑741(1)

Wrongful death action against supervisory police officers for shooting of plaintiffs' son by patrolman could not be maintained where statutory notice had not been given to such officers. Government Code, § 1981.

5. Municipal Corporations 🔑742(4)

Allegation that statutory notice of verified claim had been presented to police officers sought to be charged for wrongful death of plaintiffs' son was an essential element of plaintiffs' cause of action. Government Code, § 1981.

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Lyman A. Garber, Beverly Hills, for appellants.

Ray L. Chesebro, City Atty., Robert B. Burns, Deputy City Atty., Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants predicated upon the sustaining of their demurrers without leave to amend in an action to recover damages for wrongful death.

Facts: Plaintiffs brought an action for wrongful death of their son, shot by a Los Angeles Reserve Police Officer while on patrol duty, against the City of Los Angeles, Chief Parker as Chief of the Los Angeles Police from August 9, 1950 to the date of the filing of the complaint, and C. B. Horrell as Chief of Police from 1940 to June, 1949. A claim under the provisions of Section 1981, Government Code, was served upon and filed with the clerk of the City of Los Angeles but not presented to nor filed with any other person.

General demurrers having been sustained without leave to amend and a judgment entered pursuant thereto the present appeal has ensued.

[1–3] *Questions:* First: *Was the demurrer properly sustained as to the defendant municipal corporation?*

Yes. These pertinent rules are here controlling:

1. A municipal corporation is not liable in the absence of a special statute rendering it liable (there is no such statute applicable to the facts of the instant case), for the torts of its agents in the performance of governmental as distinguished from proprietary functions. (Norton v. Hoffmann, 34 Cal.App.2d 189, 194 [1], 93 P.2d 250; Wood v. Cox, 10 Cal.App.2d 652, 653 [1], 52 P.2d 565.)

2. The maintenance and operation of a police department is a governmental function. (Brindamour v. Murray, 7 Cal.2d 73, 78, 59 P.2d 1009.)

Under the foregoing rules it is evident that the demurrer was properly sustained as to defendant municipality.

[4, 5] Second: *Did the complaint fail to state a cause of action against defendants Horrell and Parker because it is not alleged that plaintiffs complied with the provisions of Government Code, section 1981?*

Yes. Government Code, section 1981 reads thus:

> "*Claim for damages: Presentation and filing.* Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor."

In the present case plaintiffs failed to allege (and they concede they could not truthfully make such an allegation) that they had presented a verified claim in writing as provided in section 1981, Government Code, for damages to either of the public officers sought to be charged for the wrongful death of their son. Such an allegation is an essential element of plaintiffs' cause of action. (Ward v. Jones, 39 Cal.2d 756, 249 P.2d 246.)[1]

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.

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114 Cal.App.2d 708

FIRST NAT. BANK OF DURANGO v. HAINES.

Civ. 8332.

District Court of Appeal, Third District, California.

Dec. 12, 1952.

Action by bank against individual wherein the Court, Tehama County, entered judgment in favor of the bank. On August 8, defendant requested estimate of cost of preparing reporter's transcript, on August 27 he filed notice of appeal; and on September 8 he received the estimate of costs. On October 20 plaintiff served notice for hearing on motion to dismiss appeal. The District Court of Appeal, Per Curiam, held that defendant's affidavit in opposition to motion failed to establish that he was entitled to relief from default for failure to comply with Rules on Appeal.

Motion granted; appeal dismissed.

1. Appeal and Error ⇐801(3)

Where, on showing made, respondent was entitled to have appeal dismissed at the time its notice of motion to dismiss was filed, sole question presented for determination was whether, on showing made, appellant was entitled to relief from default for failure to comply with Rules on Appeal.

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[1] It is to be noted that at the time the present appeal was taken the Supreme Court had not filed its opinion in Ward v. Jones, supra.

2. Appeal and Error 🔑799

Affidavit in opposition to respondent's motion to dismiss appeal failed to establish that appellant was entitled to relief from default for failure to comply with Rules on Appeal.

3. Appeal and Error 🔑801(1)

Although there is a strong public policy in favor of hearing appeals on their merits, nevertheless, a respondent is entitled to have an appellant proceed with expedition, and the burden of so proceeding is cast upon the appellant.

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Harrison W. Call, Sacramento, for appellant.

C. A. Stromsness, Red Bluff, for respondent.

PER CURIAM.

This is a motion by respondent to dismiss the appellant's appeal from a judgment entered August 4, 1952. From the affidavit of the Clerk of the trial court it appears that the only action taken by appellant was the filing of a notice of appeal on August 27, 1952. However, it does appear from an affidavit of the court reporter that on or about August 8, 1952, appellant requested an estimate of the cost of preparing a reporter's transcript and that an estimate was given to appellant on or about September 8, 1952, but that the reporter received no further communication from appellant. Respondent's motion was noticed for hearing on November 13, 1952 and a copy thereof was served by mail on appellant on October 20, 1952. On November 10, 1952 appellant filed his application for relief from default, and on November 12, 1952 filed his personal affidavit in support thereof.

[1] There can be no question but that on the showing made by respondent it was, at the time its notice of motion was filed, entitled to have the appeal dismissed. Clyde v. Clyde, 85 Cal.App.2d 249, 193 P.2d 9.

Under such circumstances the sole question presented for determination is whether on the showing made appellant is entitled to relief from default for failure to comply with the Rules on Appeal.

[2] From our examination of appellant's affidavit we find nothing which would warrant this court in granting his request for relief. Clearly appellant did not take the steps necessary to perfect his appeal nor did he request any extension of time to enable him so to do. Nor is there any showing that such delay was caused by the failure of any court officer or any other party.

[3] While it has been said that there is a strong public policy in favor of hearing appeals on their merits nevertheless a respondent is entitled to have an appellant proceed with expedition, and the burden of so proceeding is cast upon the appellant. Clyde v. Clyde, supra.

The motion is granted and the appeal is dismissed.

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114 Cal.App.2d 616

PEOPLE v. LEVINE.

Cr. 4804.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of unlawfully issuing a forged prescription for narcotics, and he appealed. The District Court of Appeal, Fox, J., held that record was insufficient to sustain defendant's assertion that plea of guilty had been elicited by fraud and collusion and that judge had told defendant's attorney that defendant would be granted probation if he would change his plea of not guilty to guilty.

Judgment affirmed.

1. Criminal Law 🔑1116

In prosecution for unlawfully issuing forged prescription for a narcotic, wherein it was alleged that defendant was absent from State for period of approximately six years, and that he had previously been convicted of a felony and imprisoned therefor, record did not sustain defendant's contention that his plea of guilty and admission of absence from State had been procured by fraud and collusion and that his attorney had been told by trial judge that judge would grant defendant probation if he would change his plea of not guilty to guilty.

2. Criminal Law ⚿152

Fact that period of six years and three months elapsed between commission of criminal offenses and filing of information did not preclude prosecution when defendant admitted allegation that he had been absent from State for approximately five years and ten months of such period. Pen.Code, § 802.

◆

Morris Levine, in pro. per.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

FOX, Justice.

In an information filed August 15, 1951, defendant was charged with violating section 11715 of the Health and Safety Code in three counts. In count I defendant was accused of such violation on or about June 4, 1945, in that he unlawfully issued a prescription bearing a forged and fictitious signature for a narcotic. It is further alleged that defendant was absent from and not an inhabitant of, nor usually a resident within, the State of California for the period from July 1, 1945, to April 30, 1951. The information further charged defendant with conviction of a prior felony, to wit, counterfeiting, and that he served a term of imprisonment therefor in the federal prison. The other counts charge like offenses alleged to have been committed upon different dates. Defendant initially entered his plea of not guilty. Thereafter, by leave of court, defendant, with his counsel, withdrew his plea of not guilty and entered his plea of guilty as charged in count I. He admitted the prior conviction and also admitted being absent from the state, as alleged in the information. Defendant's application for probation was denied and the court sentenced him to the state prison.

On this appeal defendant makes two contentions: (1) that his plea of guilty was gained through extrinsic fraud and collusion, and (2) that the information filed against him shows that the statute of limitations barred his prosecution. There is no merit in either of these contentions.

[1] Defendant asserts that he was induced to change his plea of not guilty to one of guilty, and to admit being out of the State of California as alleged in the information, by his attorney who was purportedly told by the trial judge that the judge would grant defendant probation if he would change his plea of not guilty to guilty. The record brought up on this appeal does not, however, disclose any factual foundation for defendant's claim of fraud and collusion. He did not make any showing to the trial court that he had been thus imposed upon. The trial court, therefore, had no opportunity to pass upon his charges; consequently, there is nothing before this court to review on that question. People v. Agnew, 16 Cal.2d 655, 660, 107 P.2d 601; People v. Evans, 102 Cal.App.2d 320, 321, 227 P.2d 461; People v. Ruiz, 103 Cal.App.2d 146, 149, 229 P.2d 73.

[2] It is true that a period of some six years and three months elapsed between the commission of the offenses and the filing of the information. It was, however, alleged and admitted by defendant (although from his brief he now appears to deny the fact) that he was absent from the State of California for approximately five years and ten months of that time. Under section 802 of the Penal Code such absence is deducted in figuring the period of limitation. It is thus clear that the statute of limitations had not run against the charge. People v. Newell, 192 Cal. 659, 669, 221 P. 622; People v. Cheaney, 111 Cal.App. 55, 58, 295 P. 84; People v. McGill, 10 Cal.App.2d 155, 158, 51 P.2d 433.

Defendant purports to appeal from an order denying his motion for a new trial.

The record, however, fails to disclose that any such motion or order was made. There is, consequently, nothing before this court in relation thereto for us to pass upon.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

114 Cal.App.2d 605

PEOPLE v. ROHE.

Cr. 2380.

District Court of Appeal, Third District, California.

Dec. 8, 1952.

Hearing Denied Jan. 5, 1953.

Defendant was convicted in the Superior Court, Glenn County, W. T. Belieu, J., of violating provisions of Agricultural Code declaring that defendant, as produce dealer, could employ only a licensed agent, and that he account promptly, correctly, fully and properly and to make settlement for produce bought, and was sentenced to imprisonment, and he appealed. The District Court of Appeal, Peek, J., held that sentence of imprisonment for failure to account and settle for produce purchased was invalid for violation of constitutional guaranty against imprisonment for debt.

Judgment affirmed in part; reversed in part.

1. Criminal Law 🔑112(1)

Under provisions of Agricultural Code requiring that produce dealer employ as his agent only a person also licensed, and providing that prosecutions for violation might be tried in county in which violation occurred, county in which unlicensed agent acted had jurisdiction to prosecute defendant dealer who hired agent in a different county where he had his place of business. Agricultural Code, §§ 1261 et seq., 1273; Pen.Code, § 781.

2. Licenses 🔑40

Under provisions of Agricultural Code relating to produce dealers, statement, declaring that existence of facts on basis of which Director of Agriculture may refuse to grant a license or may revoke same is a violation of the chapter, is sufficient to constitute the hiring of an unlicensed agent a criminal offense. Agricultural Code, §§ 1261 et seq., 1269.

3. Criminal Law 🔑1169(1)

In prosecution of produce dealer for violation of Agricultural Code, wherein it was not denied that agent made purchases with which defendant was charged, question of admissibility of evidence of other purchases of hay by agent under similar circumstances was wholly academic, and such evidence could not have affected conclusion reached by jury. Agricultural Code, §§ 1261 et seq., 1269.

4. Criminal Law 🔑1128(2)

Even though record of preliminary examination was not properly a part of record on appeal, said record being before District Court of Appeals would be examined to determine whether trial court erred in denying defendant's motion to dismiss the information on grounds of insufficiency of evidence after preliminary examination.

5. Constitutional Law 🔑83(3)

Four exceptions to constitutional guaranty against imprisonment for debt are: certain types of services which may be made compulsory, situations in which there exist not only act of nonpayment of debt but other elements as well, cases where debtor has been guilty of fraud or wilfulness in obtaining money or credit, and the situation where employer by use of superior economic position takes unconscionable advantage of employee and hence comes within fraud exception. Const. art. 1, § 15.

6. Constitutional Law 🔑83(3)

Power to prescribe punishment in a criminal case may not be used to defeat the constitutional guaranty against imprisonment for debt. Const. art. 1, § 15.

7. Constitutional Law 🔑83(3)

The courts will not permit purposes of constitutional provision forbidding imprisonment for debt to be circumvented by mere form, and, accordingly, statutes declaring nonpayment of obligation to be a crime are examined in light of this provision, and their validity is dependent upon whether legislative objective is consistent with constitutional guaranty. Const. art. 1, § 15.

8. Agriculture ⚿16
Constitutional Law ⚿83(3)

Provision of Agricultural Code declaring that it is misdemeanor for produce dealer to fail to make settlement for produce purchased is not by its terms within exceptions to constitutional guaranty against imprisonment for debt, and, hence, sentence of imprisonment imposed on produce dealer following conviction for violation of said provision was invalid. Agricultural Code, §§ 1261 et seq., 1273; Const. art. 1, § 15.

◆

Gail A. Strader, Deputy Atty. Gen., for respondent.

Duard F. Geis, Bruce H. Thomas and Ned C. Tucker, Willows, for appellant.

PEEK, Justice.

This is an appeal by defendant from a judgment convicting him of certain violations of the Agricultural Code and from an order denying his motion for a new trial.

The Information was in two counts. Count One charged a violation of Section 1269 of the Agricultural Code, in that defendant, in Glenn county, knowingly employed an agent, one Dunkle, without causing said agent to comply with the licensing requirements of Chapter 6, Division 6 of said code. Count Two charged him with violation of section 1273 of said code, in that he failed to account and make settlement for a quantity of hay purchased from one Millar in said county. Defendant's demurrer was overruled as was his motion for dismissal. He then pleaded not guilty, and following a trial upon both counts was found guilty of the crimes as charged.

During all of the times pertinent herein defendant was a hay and grain dealer licensed under the provisions of said Chapter 6, Division 6 of said code, and had his principal place of business in the city of Hollister, San Benito county. Dunkle, who was not licensed as required by said code, acted as defendant's agent in the purchase of some hay from one Millar in Glenn county. Pursuant to the contract made by Dunkle with Millar approximately 165 tons of hay were delivered to the Rohe Hay & Grain Company, being picked up in Glenn county by trucks belonging to said company. Although Millar received slips from the truck drivers for each of the fourteen loads of hay taken it appears that he received only two weight certificates representing two loads weighed at his request in Butte City and that the remaining loads were weighed in Willows under the supervision of one Lowe, a hay dealer in that city. The terms of payment as provided in the contract were "net cash not later than fifteen days after movement." However, Millar received nothing from defendant. Subsequently he received a small sum of money from the State of California, representing the obligation under defendant's bond with the State. Some time thereafter he received an itemized statement of the amount owing him by defendant. The correctness of this statement is not challenged. Upon the facts so presented the jury found the defendant guilty as charged, and the court, in pronouncing judgment, ordered that the terms of conviction on each count should run concurrently.

[1] Defendant first contends that Glenn county lacked jurisdiction to try the case for the reason that the offense was not committed in that county but in the county in which the specific act of hiring Dunkle took place. This is true, he argues, because the crime with which defendant is charged was complete when defendant hired Dunkle as his agent and hence the venue could only be in the county where such hiring took place. With respect to venue, section 1273 of the Agricultural Code provides in part that prosecutions arising by virtue of the provisions of that chapter may be tried "within the county in which the violation of this chapter occurred." Furthermore Penal Code section 781 provides, "When a public

offense is committed in part in one county and in part in another * * * the jurisdiction is in either county." The essence of the offense here charged consists in defendant's employment of Dunkle to act for him without first having secured the necessary license. Necessarily that employment included actions of Dunkle in Glenn county as well as the act of hiring which apparently took place in San Benito county. Therefore it cannot be said that Glenn county lacked jurisdiction to try the case.

[2] Appellant's second contention is that the complaint did not state a public offense, since section 1269 of said code, upon which it was predicated, is ambiguous. In support thereof he contends that said section was not intended to nor did it attempt to define criminal offenses under the act but merely listed the grounds upon which a license under said chapter of the act might be denied, revoked or suspended. In this defendant has overlooked a further provision of said section. In addition to giving the Director of Agriculture the right to refuse to grant a license or to revoke the same upon the grounds set forth in said section, it is provided that "the existence of which [facts] is hereby declared to be a violation of this chapter."

[3] Appellant also contends that the trial court erred in admitting evidence of a subsequent purchase of hay by Dunkle under similar circumstances. Since it is not denied that Dunkle did purchase the hay from Millar for the Rohe Hay & Grain Company and that payment was not made to the farmers pursuant to the contract of purchase therefor, any discussion concerning the admissibility of such evidence is wholly academic, and hence under the admitted circumstances, it could not have affected the conclusion reached by the jury upon Count One.

[4] Defendant also contends that the trial court erred in denying his motion to dismiss the information on the grounds of insufficiency of the evidence at the preliminary examination. Even though, as respondent contends, the record of the preliminary examination was not admitted in evidence at the trial in the Superior Court and hence is not properly a part of the record on appeal, said record is now before this court and we have examined the same and find no merit in such contention by defendant.

Lastly it is defendant's contention that his conviction under Count Two violated section 15 of Article I of the Constitution of this state which provides that "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of wilful injury to person or property". His argument in support of this contention is that since neither fraud nor wilfulness are made elements of the crime charged there can be no basis for his imprisonment.

Section 1273 of the Agricultural Code, which is the basis of the second count, provides in part as follows: "(1) (Misdemeanors.) Any person is guilty of a misdemeanor and is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than one year or by both who assumes or attempts to act or acts as a commission merchant, dealer, broker, cash buyer, or agent without a license, or who: * * * (b) Fails to account promptly, correctly, fully and properly and to make settlement therefor as herein provided." The last three words thereof, "as herein provided" apparently refer to section 1272, wherein it is provided in part:

> "Every dealer must pay for farm products delivered to him or it at the time and in the manner specified in the contract with the producer, but if no time is set by such contract, or at the time of said delivery, then within thirty days from the delivery or taking possession of such farm products."

Respondent's argument in answer to defendant's contention is to the effect that while a statute which subjects one to criminal prosecution for failure to pay for farm products might possibly violate the constitutional provision here in question, yet, when such failure to pay is coupled with the further provision such as in the present case where failure to account is included with failure to pay, then the constitutional prohibition does not attach. Nothing more is said by respondent nor has it cited any authority either directly or indirectly in support of such argument.

[5] The exceptions noted in the constitutional provision may be grouped in four general classifications as stated in Witkin's Summary of California Law, Sixth Edition, Vol. 2, p. 1078, the first includes certain types of services which may be made compulsory, e. g., service in the armed forces. The second [and this apparently is the class within which respondent attempts to bring the present proceeding] contemplates those situations in which there exist not only the act of nonpayment of a debt but other elements as well, such as the refusal to pay alimony, which is punishable by imprisonment, not for the failure to pay the obligation but for the failure to comply with court order, and hence punishable as a contempt. The third includes those cases where a debtor has been guilty of fraud or wilfulness in obtaining money or credit which he owes. The fourth and final classification is illustrated by the recent case of In re Trombley, 31 Cal.2d 801, 193 P.2d 734, which contemplates the situation where an employer by use of his superior economic position takes an unconscionable advantage of an employee and hence comes within the fraud exception.

[6, 7] There can be no question but that "the power to prescribe punishment in a criminal case may not be used to defeat the constitutional guaranty against imprisonment for debt." In re Trombley, supra, 31 Cal.2d at page 805, 193 P.2d 734 at page 737. Nor will the courts "permit the purposes of the constitutional provision forbidding imprisonment for debt to be circumvented by mere form, and, accordingly, statutes declaring the nonpayment of an obligation to be a crime are examined in the light of this provision, and their validity is dependent upon whether the legislative objective is consistent with the constitutional guaranty." In re Trombley, supra, 31 Cal.2d at page 804, 193 P.2d at page 737.

[8] In the instant case the defendant, in Count Two of the Information, was charged in the language of section 1273, subsection (b) of the Agricultural Code with failing "to account promptly, correctly, fully and properly and to make settlement therefor". Said section contains no provision expressly requiring an intent to defraud as an essential element of the crime charged and hence is not within the constitutional exception. See People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331. Nor does said section contain any provision requiring wilful refusal to pay as an element of the crime charged, thereby bringing the act denounced by the section within the fraud exception of the Constitution. See In re Trombley, supra.

All that was involved in the transaction which forms the basis of the alleged criminal act set forth in Count Two was a simple contract between two parties, one to sell and the other to buy, some hay. The only feature which distinguishes this transaction from thousands of others occurring daily is that in this case the buyer, instead of being named a defendant in a civil action for his failure to pay, was made the defendant in a criminal action and sentenced to six months in the county jail for his failure to pay. Under such circumstances no clearer case could be presented for the imposition of the constitutional guaranty against imprisonment for debt.

The judgment as to Count One is affirmed and the judgment as to Count Two is reversed.

SCHOTTKY, Justice pro tem., and VAN DYKE, J., concur.

114 Cal.App.2d 611

LOOPE et al. v. GREYHOUND LINES, Inc. et al.

Civ. 4466.

District Court of Appeal, Fourth District, California.

Dec. 8, 1952.

Action to recover for personal injuries and property damages sustained in a collision between an automobile of plaintiffs and a bus of defendant corporation and against the driver individually. From a judgment of the Superior Court of Orange County Raymond Thompson, J., after demurrer sustained without leave to amend, the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that the cause of action for personal injuries was barred by limitations as against the corporation but not against the driver and that the count for property damages stated a good cause of action against the driver and as against the defendant corporation.

Affirmed in part and reversed in part.

1. Limitation of Actions ⚿88

The statute tolling limitations because of absence of defendant from the state has no application to foreign corporations in view of the provision relative to service of summons upon such corporations. Corporations Code, §§ 6403, 6500, 6501; Code Civ.Proc. § 351.

2. Limitation of Actions ⚿180(4)

In action for damages sustained in collision between automobile of plaintiffs and a bus of defendant and against the driver thereof where plaintiffs relied upon the statute tolling limitations because of the absence of defendant from the state, sustaining general demurrer of both defendants was error where under the record the individual defendant could have been outside the state so as to toll limitations as against him. Code Civ.Proc. § 351.

3. Pleading ⚿204(2)

A general demurrer challenges sufficiency of pleading to state any cause of action and must not be sustained if pleading states facts from which any liability results although not for some or all of the relief sought to be obtained.

4. Limitation of Actions ⚿180(1)

Where plaintiffs joined cause of action against defendant corporation for damages for personal injuries with a cause of action for damages to personalty and first cause of action was barred by limitations but a cause of action for damages to property was stated, sustaining a general demurrer was error.

5. Pleading ⚿64(2)

A complaint may join in one count allegations of damage to the person and property under the statute. Code Civ.Proc. § 427.

6. Action ⚿50(9)

In action against a bus company and driver for damages sustained in an automobile collision, complaint stated a good cause of action against the driver and against the corporation for property damages not barred by limitations. Code Civ. Proc. § 351.

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James C. Webb, Long Beach, for appellants.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondents.

MUSSELL, Justice.

Plaintiffs allegedly sustained injuries and property damage on February 2, 1947, which they claimed were caused by the negligence of the defendant Greyhound Lines, Inc. and its driver, Oscar LeRoy Perkins.

Defendants demurrer to the complaint, setting up the statute of limitations, Sec. 340, Subd. 3, Code Civ.Proc., as a bar to the complaint, was sustained with leave to amend. An amended complaint containing five causes of action was filed and in each cause of action it was alleged, among other matters "that between the dates of February 2, 1947, and February 1, 1948, said defendants were absent from and outside the jurisdiction of the State of California for more than twenty (20) days." The defendants then filed a demurrer to the amended complaint again setting up the statute of limitations as a bar and also filed a motion to strike the quoted allegations from the complaint. The trial court sustained the demurrer without leave to amend and made no ruling on the motion to strike. From the judgment of dismissal which followed, plaintiffs have appealed.

In the first cause of action in the amended complaint it is alleged, among other things, that on February 2, 1947, the defendant Oscar LeRoy Perkins was, with the consent and permission of the defendants, driving the defendants' Greyhound bus in a general westerly direction along the Pacific Coast Highway at and near its intersection with Westminster Boulevard; that at said time plaintiff Edward T. Loope was driving plaintiffs' automobile in a general easterly direction across the said intersection; that said Oscar LeRoy Perkins so carelessly, recklessly and negligently drove said bus so as to cause it to collide with plaintiffs' automobile, in consequence of which negligence plaintiff Edward T. Loope sustained bodily injuries, to his damage in the sum of $40,000.

The second cause of action reincorporates all of the charging allegations of the first cause of action and then alleges that the negligence of the defendants caused plaintiffs' automobile to be damaged and demolished, necessitating repairs in the sum of $800, and the loss of clothing in the reasonable value of $20.

The third cause of action includes all of the charging allegations in the second cause of action and then alleges that plaintiffs obtained medical, surgical and hospital aid in the sum of $350 and that the plaintiff Edward T. Loope lost seven weeks of employment at the sum of $85 per week.

In the fourth cause of action, after a repetition of the charging allegations in the second cause of action, it is alleged that Edward T. Loope was incapacitated and rendered unable to carry on his regular family duties and solely and directly by reason thereof said plaintiffs were deprived of the ordinary connubial relationship theretofore enjoyed for a long period of time, to their damage in the sum of $10,000.

In the fifth cause of action, after a repetition of the charging allegations of the second cause of action, it is alleged that "each and every of their said injuries are lasting and permanent and that they will in the future suffer great pain, and that they also will in the future be forced to seek and obtain additional medical, surgical and hospital aid, treatment, care and attention incurring expense therefor."

The first, third, fourth and fifth causes of action are clearly for damages for personal injuries and are barred by the statute of limitations set forth in the demurrer, unless it can be said that the allegation "that between the dates of February 2, 1947, and February 1, 1948, said defendants were absent from and outside of the jurisdiction of the State of California for more than twenty (20) days," places the defendants within the exception stated in section 351 of the Code of Civil Procedure, which provides as follows:

> "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

[1] The amended complaint alleges that defendant Greyhound Lines, Inc. is and was a corporation. Nothing more. If the said defendant is and was a foreign corporation, section 351, supra, can have no application in view of the California statutory provision relative to service of summons upon foreign corporations. Secs. 6403, 6500, 6501, Corporations Code; Taylor v. Navigazione Libera Triestina, 9 cir., 95 F.2d 907. If defendant Greyhound Lines, Inc. is a California corporation, obviously, it cannot depart from or be absent from this state. It is admitted by defendant corporation that defendant Oscar LeRoy Perkins could have been out of the state.

[2] Under this state of the record, we conclude that the action was commenced in time as to Oscar LeRoy Perkins, individually, and that the demurrer was improperly sustained as to him.

[3–5] In the second cause of action plaintiffs have joined a cause of action against the defendant corporation for damages for personal injuries with a cause of action for damages to personal property, and insofar as the defendant corporation is concerned, the cause of action for damages for personal injuries is barred by the statute of limitations. However, a cause of action for damages to property is stated, which cause of action was commenced in time, and, as was said in Phillips v. Gonzales, 44 Cal.App.2d 267, 269–270, 112 P.2d 272, 274:

> " 'A general demurrer challenges the sufficiency of the pleading to state *any* cause of action and must not be sustained if the pleading states facts from which any liability results, although not for some or all of the relief sought to be obtained. Hall v. Bell, 143 Wis. 296, 299, 127 N.W. 967. If the pleading states grounds for relief, either legal or equitable, it will stand the test of a general demurrer. Swan v. Talbot, 152 Cal. 142, 144, 94 P. 238, 17 L.R.A.,N.S., 1066. It is sufficient if the pleading contains the allegations essential to the statement of any one cause of action, even though an abortive attempt be made to state facts calling for other and different relief.' See, also, Pacific Mut. Life Ins. Co. v. Shepardson, 77 Cal. 345, 19 P. 583; Nelson v. Merced County, 122 Cal. 644, 646, 55 P. 421; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 685, 688, 200 P. 601; Kelley v. Cameron, 72 Cal.App. 660, 663, 237 P. 819."

And in Farvour v. Geltis, 91 Cal.App.2d 603, 605, 205 P.2d 424, it is held that a complaint may join in one count allegations of damage to person and property under the provisions of Code of Civil Procedure, section 427.

[6] It follows that count two stated a good cause of action as to defendant Oscar LeRoy Perkins and also a good cause of action as against the defendant corporation for property damage.

The judgment of dismissal is affirmed as to counts one, three, four and five of the amended complaint insofar as it involves defendant Greyhound Lines, Inc., and is reversed as to defendant Oscar LeRoy Perkins. As to count two, the judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

ZUCKERMAN et al. v. UNDERWRITERS AT LLOYDS, LONDON.*

Civ. 19007.

District Court of Appeal, Second District, Division 1, California.

Dec. 2, 1952.

Rehearing Denied Dec. 29, 1952.

Hearing Granted Jan. 28, 1953.

Beneficiaries of accident policies brought action against insurer to recover for alleged accidental death of insured. The Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment for insurer, and beneficiaries appealed. The District Court of Appeal, Drapeau, J., held that burden was on insurer to prove its defenses that there could be no recovery on ground that insured's death was caused by disease, natural causes, or intentional self-injury.

Judgment reversed and cause remanded for new trial.

1. Appeal and Error 🔑1064(1)
Insurance 🔑646(6)
Trial 🔑234(7)

In action on accident policies to recover for alleged accidental death of insured, on ground that insured died from exposure to elements and physical exhaustion, which resulted from accident during fishing trip, wherein insurer pleaded defenses that death was caused by disease, natural causes, or intentional self-injury, burden of proving insurer's defenses was on insurer, and not on beneficiaries, and instruction to the contrary was reversibly erroneous, where evidence was sharply conflicting and evenly balanced.

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* Subsequent opinion 267 P.2d 777.

2. Appeal and Error ⚷1064(2)
Trial ⚷191(1)

Instructions, which assume facts that are controverted in the case, are reversibly erroneous.

3. Appeal and Error ⚷1064(2)
Trial ⚷191(3)

In action on accident policies to recover for alleged accidental death of insured, on ground that insured died from exposure to elements and physical exhaustion, which resulted from accident during fishing trip, wherein insurer pleaded defenses that death was caused by disease, natural causes, or intentional self-injury, instruction that assumed as an established fact that insured continuously before and after alleged accident was suffering from some self-injury, disease, or natural cause, was reversibly erroneous, where evidence was either to the contrary or was directly conflicting.

◆

Francis J. Gabel and Henry F. Walker, Los Angeles, for appellants.

Adams, Duque & Hazeltine, Los Angeles, Waller Taylor II, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

By the instant action, plaintiffs seek to recover as beneficiaries under two personal accident insurance policies in which George H. Francis, deceased, was named the assured. Both policies were for the period October 11, 1949, to October 11, 1950. One was for the capital sum of $100,000, payable to the law firm of which the insured was a member; the second was for $75,000, $50,000 payable to said law firm, and $25,000 to James H. Francis, brother of the assured.

The policies are identical except for the amounts, and provide "If at any time during the currency of this certificate the assured shall sustain any accidental bodily injury caused by accident * * * which shall, solely and independently of any other cause within six (6) calendar months from the date of the accident causing such bodily injury, occasion the disablement * * or * * * the death of the assured", the underwriter shall pay to the assured or his beneficiaries the amounts set forth in the schedule of compensation, the compensation for death being 100% of the capital sum.

> "Bodily injury" in addition to that which is caused by accident is defined to include "death by exposure to the elements or physical exhaustion * * resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation."

The policies also contain an exclusionary clause which provides among other things: "This certificate does not cover death * * * directly or indirectly caused or contributed to by intentional self-injury, disease or natural causes." Immediate notice to insurer is required in the event of death, and the policies give to insurer the right to have an autopsy or post-mortem examination to ascertain the true cause of death.

On March 16, 1950, while the policies were in full effect, the assured died under the following circumstances:

Early on Friday morning, March 10th, Mr. Francis left his apartment in Los Angeles and joined a group of friends for a fishing trip in the Bay of Los Angeles, Mexico. They flew in a chartered plane from Los Angeles International Airport to Walker's Camp located at Baja California, Mexico. There were about a dozen men in the party, including the pilot of the plane, Mr. Stilbert. Most of them were either lawyers or insurance investigators and executives.

Several members of the party went fishing that afternoon. Mr. Francis stayed in camp. Some of the freshly caught fish were prepared for dinner. All retired about 8:30 and "slept outside without covers." Mr. Francis slept in a bed on the back porch of the house. They arose early Saturday morning, had breakfast and left the camp before sunrise, i. e., at 4:30 or 5:00. There were four rowboats or skiffs, known as 14-foot Pangas, equipped with outboard motors. Mr. Francis accompanied Messrs. Harrison and Stilbert in a

14-foot boat equipped with two motors. The weather was fine and the water calm when they started out. The boats proceeded to different fishing places. There were several islands in the bay, the first of which was five or six miles from the mainland. After passing this island the boats were no longer in sight of each other.

Between 9:00 and 10:00 o'clock that Saturday morning, the wind came up and continued to blow all day making it impossible to fish. All tried to get back to camp but only one boat was successful. The other three managed with great difficulty to reach Smith Island which was about eight or ten miles from the mainland.

The Francis, Harrison and Stilbert boat was the last to land. That group fished around the various islands and between 6:30 and 7:00 that morning, Mr. Francis hooked and fought a big fish for 45 minutes before losing it. When the wind came up around 9:00 o'clock the water was very rough in the open. They fought their way to Smith Island. They were wet with spray, the motors gave out and it was necessary to resort to oars to keep the boat from capsizing. Both Francis and Stilbert took turns rowing, Mr. Francis for the last 1,000 or 1,500 feet. During this time the velocity of the wind was 35 to 40 miles per hour. They landed their boat on the island about noon. Mr. Francis assisted in pulling the boat ashore. He was wringing wet and was perspiring and panting from the exertion. He lay down and napped for a while. The others wandered around and finished eating their lunches. The storm continued and by late afternoon it became apparent that they would have to remain overnight. They scoured the island for shelter and firewood. However, the island was rocky and barron of vegetation, and they found only small pieces of driftwood and a log. They found a cave and near it an indentation or smaller cave.

It appears from the testimony of the participants that a miserable night was spent on the island with little rest for any one. The night was cold and the men inadequately clad. During the night they had to move the boats three or four times from the rising tide. The wind blew spray into the cave. A fire was lighted in the early morning hours on Sunday.

About daybreak on Sunday, March 12, 1950, the wind subsided and they returned to the Walker camp. There was evidence that Mr. Francis appeared to be exhausted and complained about not feeling well. Mrs. Walker testified that when they reached the camp, "They were a pretty sorry looking lot. They were cold and wet and hungry and had had a great deal of exposure. I remember him (Mr. Francis), because he seemed particularly chilled, and we built a big fire in the fireplace and I remember he sat as close to the fire as he could get with a sweater around him."

They left around 1:00 o'clock and arrived in Los Angeles about 7:00 o'clock that evening. Although Mr. Stilbert, the pilot, testified that at no time did Mr. Francis appear to him to be ill, there was other testimony that he kept himself wrapped in blankets; was lying down in the plane all the way to Los Angeles, and appeared to have a chill. Three of his companions took him to his apartment in Los Angeles where they divided a freezer of fish. Mr. Francis took a hot shower and went to bed and was asleep when they left. On Monday morning, Mr. Francis was "sneezing, coughing, blowing his nose", and had all the symptoms of a bad cold. He remained home and called his secretary saying he did not feel well. On Wednesday he called her again; said he was ill and was going to the desert to get rid of his cold. He also called his doctor. He told him he had been fishing and caught cold, and was going to the desert to bake out. The doctor prescribed aureomycin and some sleeping capsules which he directed the druggist to deliver to Mr. Francis.

Mr. Messer, an associate of decedent, saw him on Thursday morning and again at noon. He testified that Mr. Francis' cold appeared to be very bad; that he complained about it and said he was going to his brother's place in the desert to bake out. Mr. Francis told him, "I'll make it as far as Victorville and then I'll have a driver from there on." On Wednesday, he made arrangements with Mrs. Knutson, a friend of his in Victorville, to drive him from that place to Tecopa where his brother lived. Mrs. Knutson prepared for the trip and waited for him on Thursday. He did not come. However, around 5:30 on Thursday afternoon, March 16th, he parked his car in a picnic ground near Deep Creek about 18 miles from Victorville. On Saturday morning, Mrs. McInnis who lived near the picnic ground reported the parked car to constable Powell. A deputy sheriff of San Bernardino County made an investigation and found that Mr. Francis had died while lying in the back seat of the car. He was lying on his back with a small pillow under his head. His right arm was across his body; his collar, tie and clothes were intact. The keys to the car were in his pocket, as was $1.04; the windows were closed; a blanket and a small bag of wearing apparel were in the trunk of the car. An empty bottle of "Murine for the Eyes" was in the glove compartment. Nothing else was found.

The body was embalmed "by the gravity pressure method" and on Monday, March 20th, an autopsy was performed by Dr. Baird, autopsy surgeon for San Bernardino County. The certificate of death signed by him listed the cause of death as follows:

> "*Disease or condition directly leading to death:* (A) Broncho-pneumonia.
>
> "*Antecedent Causes.* Morbid conditions, if any giving rise to the above cause (A) stating the underlying cause last:
>
> "Due to (B) Edema of brain Due to (C) Acute alcoholism."

On March 22nd the body was cremated.

Within ten days the policies were discovered among decedent's papers in his law office and on March 29, 1950, notice of the death and claim on behalf of the beneficiaries to the proceeds of the policies were given to the insurer. On April 12, 1950, defendant's representative Van Deusen by letter to Mr. Gabel, plaintiffs' attorney, requested permission to perform a post-mortem examination of the body pursuant to the provisions of the policies. By his letter to Mr. Van Deusen, dated April 25, 1950, Mr. Gabel informed him that the body had been cremated.

At the trial, decedent's divorced wife, Flossie D. Francis, who was on friendly terms with him from 1947 until the time of his death, testified that he was a heavy drinker; that there was no limit to his drinking; that "he would drink a quart of liquor and maybe a dozen or a dozen and a half bottles of beer in one day." That after 1947 he still drank and was not well at times, "but he still couldn't abstain from liquor." That only persons who knew him "intimately" could detect any signs of alcoholism, since he carried liquor very well. She also stated that the last time she saw him just about two weeks before his death, he was still drinking and consumed a pint bottle of bourbon. He was also an habitual user of sleeping pills. Mrs. Francis related that after 1947 and until shortly before his death, Mr. Francis was "haggard and he got older looking" and did not look well during the last months of his life. He complained of pain in his shoulder and told her something was wrong.

Mrs. Frances C. Herrod, who had known decedent well from 1948, testified that he was a heavy but sociable drinker, taking as many as ten highballs in an evening, but that he would periodically cease drinking for a few months and then resume. That during the last months of his life he did not appear well, became emotionally disturbed and tired and would "just sort of fade away from you."

Contrary to this testimony, several friends of decedent testified on behalf of plaintiffs that he was in the best of health; that he rarely drank and never to excess at any time. One of them was Mr. Paul Lemley, who stated that during the times he had seen Mr. Francis outside of the office during a fourteen month period he had never seen him under the influence of intoxicating liquor. And Mr. John S. Messer, a friend, room-mate, and at one time a subordinate of Mr. Francis in the Veterans' Administration, testified that he never saw Mr. Francis take a drink, never smelled liquor on his breath, and never saw any evidence of any liquor in the apartment which he shared with Mr. Francis.

Other witnesses testified on the subjects of drinking, non-drinking and the state of decedent's health, but enough has been stated to indicate the highly conflicting character of the evidence thereon.

Mr. Francis was ill in 1948. He consulted Dr. Nolan, who was a social acquaintance as well as medical adviser. An electrocardiogram taken at that time made Dr. Nolan suspicious of a possible first degree heart block. So he sent him to Dr. Feinberg, a heart specialist who took another electrocardiogram. The heart was found to be within normal limits and other examinations disclosed the heart to be within normal range. Dr. Hayes, defendant's expert, interpreted these electrocardiograms as showing a heart block of the first degree, and definitely "beyond the range of normal."

Dr. Baird, the autopsy surgeon, stated on cross-examination that he put "acute alcoholism" on the death certificate "solely because of the statement of Dr. Bennett (the mortician) that he had known this man as an alcoholic drinker." That he found nothing in his examination of the body to indicate drinking. Also, that his diagnosis of edema of the brain "was made on fact that this condition results either from alcohol or injury and in this case there was no evidence of injury." The doctor further testified that he cut cross-sections of the coronary arteries with a sharp knife at intervals of a quarter of an inch, but found no evidence of a prior thrombosis or embolism of any kind.

Plaintiffs' expert witness, Dr. Newbarr, Chief Autopsy Surgeon for Los Angeles Coroner's office, testified that the coronary arteries were usually sectioned at intervals of one-eight of an inch and sometimes even one-sixteenth of an inch so as not to miss an area of arteriosclerosis. He also stated that it was possible that at a quarter of an inch interval, Dr. Baird might have missed such an area consisting of degenerative change causing a coronary thrombosis.

This witness in answer to a hypothetical question gave the opinion that the cause of death was bronchial pneumonia; "that bronchial pneumonia is a common sequela of a history such as we have here: exposure, exhaustion, chilling, upper respiratory infection, a cough, and a bronchial pneumonia. * * * There is nothing in the history of this case or in the autopsy findings which show that alcohol was a causative factor in any way whatsoever."

Dr. Alvin G. Foord, Director of Laboratories and Medical Research at the Huntington Memorial Hospital in Pasadena, testified as a medical expert for defendant. After examining the various exhibits and in reply to a hypothetical question, he gave as his opinion that George Francis did not die of broncho pneumonia. He did not think that any one could diagnose with accuracy a broncho pneumonia in an embalmed lung and be sure about it without microscopic studies; and that the embalming fluid might have had such an effect upon the air sacs of the lung as to produce a picture very much like pneumonia. He also went on to say that there was another reason "I don't believe this man died of pneumonia, because if you have ever seen a patient die of pneumonia you have seen a patient who gasps for breath. * * * So I would think it would be very—very unique for a man to be lying prone (sic) in a car with his tie in place, with the upper button of his shirt unopened, lying calmly with the windows shoved up. I think most people with pneumonia cry for air, they want the windows open, they want the tie off, they want no hindrance to respiration." This witness gave his opinion that the primary cause of death was a "condition which led to a circulatory collapse and edema and congestion of the lung."

As his reasons for that opinion, this witness stated "We have described already the congestion in the dependent portions of the lungs and the edema which is formed. * * * Primarily it occurs, of course, in acute heart failure. The lungs fill up. * * * Depressant drugs—the tone is all taken out of the blood vessels, the heart tone decreases, stagnation occurs, then outpouring of fluid into these air sacs. Such examples as sleeping pills; that is the classical finding of all these many people who die from an overdose of sleeping pills. Many chemical substances, among which is alcohol * * * I could run through a list of many poisons which can do it."

He further testified that the "material in this hypothetical question does not substantiate the cause of death from exposure to the elements resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation"; but that he was of the opinion that death was directly or indirectly caused or contributed to by intentional self-injury, disease or natural causes.

From the evidence thus adduced, the jury brought in its verdict in favor of defendant underwriter. From the judgment which followed, plaintiffs appeal.

This appeal is grounded upon alleged error of the trial court in giving and refusing to give certain instructions to the jury.

I. The court *refused* to give plaintiffs' requested instruction which, it is here asserted, would have correctly informed the jury that the burden rested upon defendant insurer to prove, by a preponderance of the evidence, its claim that intentional self-injury directly or indirectly caused or contributed to the death of insured. But the court *gave* defendant's requested and diametrically opposed instruction that "Plaintiffs have the burden of proving by a preponderance of the evidence that the death of George H. Francis was not directly or indirectly caused or contributed to by intentional self-injury."

As hereinbefore mentioned, the insuring clause in the policies specifically insures against death resulting from "accidental bodily injury caused by accident solely and independently of any other cause." The policies exempt liability of insurer in the event of death "directly or indirectly caused or contributed to by intentional self-injury, disease or natural causes."

By its answer, defendant pleaded as separate and affirmative defenses that death was caused by disease or by natural causes. And by an amendment to the answer, it added as an affirmative defense that death was caused by intentional self-injury.

Plaintiffs' theory of the case was that Mr. Francis died from exposure to the elements and physical exhaustion which resulted from an accident.

As stated in an annotation in 142 A.L.R. 746, "The rule supported by the overwhelming weight of authority, in cases involving accident policies or other policies with accident features containing express conditions or exceptions excluding or limiting the coverage of the policy as to an injury or death which would otherwise be within such coverage, is that the burden of proving that the insured's injury or death was within such conditions or exceptions is on the insurer, and that the plaintiff is not under any burden of negativing application of such exceptions or conditions."

In defense of the proposition that the burden rested on plaintiffs herein to prove that the death was not caused by intentional self-injury, defendant cites the cases of Kellner v. Travelers' Ins. Co., 1919, 180 Cal. 326, 181 P. 61 and Ogilvie v. Aetna Life Ins. Co., 1922, 189 Cal. 406, 209 P. 26, 26 A.L.R. 116. In both of these cases involving accident insurance policies with exclusion clauses similar to those here in question, it was held error to instruct the jury that the burden rested on *defendant* to show by a preponderance of the evidence that *disease* was a proximate cause of death of the assured. And that, "The absence of *disease* contributing to death was as much a part of the plaintiff's case under the contract, as the affirmative showing of the occurrence of an accident producing injury and of death following such injury." Kellner v. Travelers' Ins. Co., supra [180 Cal. 326, 181 P. 63].

However, in 1945, the Supreme Court in Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 309, 163 P.2d 689, 691, held that "the presence of pre-existing disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause. (Citation of authorities.)"

And in Happoldt v. Guardian Life Ins. Co., 90 Cal.App.2d 386, 400, 203 P.2d 55, 63, this court following the decision in the Brooks case held that *refusal* of the trial court to give instructions "that plaintiff had the burden of proving by a preponderance of the evidence that death did not result directly or indirectly from illness or disease of any kind."—*was not erroneous.* Also, that "Under the Brooks case * * * the plaintiff is required to prove that the accident is the proximate cause of death."

The instructions here under consideration have reference to "intentional self-injury" or suicide, not disease.

Appellants rely upon the old case of Postler v. Travelers' Ins. Co., 173 Cal. 1, 158 P. 1022, 1023. That case involved two accident policies insuring "against bodily injuries effected directly and independently of all other causes through external, violent, and accidental means (suicide, whether sane or insane, is not covered)." There was some evidence that tended to show that insured had himself fired the shot that ended his life. It was there held, 173 Cal. at page 3, 158 P. at page 1023, that on the issue of suicide, the burden rested upon the defendant insurer, citing Dennis v. Union Mutual Life Ins. Co., 84 Cal. 570, 24 P. 120. On the issue as to whether or not the death of insured had been effected through accidental means, the burden rested on the plaintiff. 173 Cal. at page 6, 158 P. at page 1024. See, also, Bebbington v. California Western States Life Ins. Co., 30 Cal.2d 157, 159, 180 P.2d 673, 1 A.L.R.2d 361.

[1] In the instant case the burden of proof rested on defendant and not on plaintiffs. The given instruction erroneously placed that burden on plaintiffs. The error was emphasized by refusal to give plaintiffs' requested instruction which correctly stated the law. See Miller v. Peters, 37 Cal.2d 89, 95, 230 P.2d 803; Akers v. Cowan, 26 Cal.App.2d 694, 699, 80 P.2d 143. Moreover, the error was magnified by rereading the instructions to the jury during its deliberations.

The evidence in this case is not only sharply conflicting but is so nearly evenly balanced that the error in instructing on the burden of proof was distinctly prejudicial, since it may well have been the deciding factor relied upon by the jury in reaching its verdict.

II. The foregoing also disposes of appellants' Point VI: That the trial court erred in instructing that the burden of proof was upon plaintiffs to prove that death was not caused or contributed to by disease.

[2, 3] III. Defendant's instruction 21, it is asserted, assumed as an established fact that Mr. Francis continuously before and after the accident was suffering from some self-injury, disease or natural cause, whereas the evidence was either to the contrary or was directly conflicting. "Instructions which assume facts that are controverted in the case constitute reversible error." Connell v. Clark, 88 Cal.App.2d 941, 948, 200 P.2d 26, 30, citing Scandalis v. Jenny, 132 Cal.App. 307, 314, 22 P.2d 545. Whether insured's death was caused by intentional self-injury, disease or natural causes was put in issue by defendant's answer and the amendment thereto.

IV. It is also urged that it was error for the court to *refuse* to instruct upon the difference between "accidental death" and "death by accidental means," and that the policies here covered the broader "accidental death."

An examination of the instructions given on that subject disclose that the court instead of instructing according to the ideas of the parties, gave instructions containing the language used in the insurance policies themselves. This was sufficient.

Because of the conclusions reached, it is not deemed necessary to unduly extend this opinion for the purpose of passing upon other points raised in appellants' briefs.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., concurs.

DORAN, J., concurs in the judgment.

114 Cal.App.2d 554

CHRISTENSEN v. TUCKER et ux.

Civ. 15333.

District Court of Appeal, First District,
Division 1, California.
Dec. 4, 1952.

Action for mandatory injunction to compel defendants to remove encroachments on plaintiff's land, and for damages. The Superior Court, in and for the County of Santa Cruz, James L. Atteridge, J., entered judgment denying injunction to compel removal, and directing payment of damages, and quieting fee title to area involved in defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that even if plaintiff was entitled to no injunctive relief, quieting of fee title in defendants to area encroached upon was error, since defendants would have been adequately protected by grant of easement.

Judgment reversed.

1. Injunction 🔑195

Where an encroachment by defendant on plaintiff's adjoining land does not irreparably injure plaintiff, and has been innocently made, and where cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, a court of equity may, in its discretion, deny the injunctive relief and compel plaintiff to accept damages.

2. Injunction 🔑51, 128

In exercising its discretion in removing an encroachment case between adjoining landowners, the court starts with the premise that defendant is a wrongdoer, and that plaintiff's property has been occupied, with result that doubtful cases are to be decided in favor of plaintiff whose property has been invaded, and, in order to deny injunction, defendant must not have been guilty of encroachment through willful act, encroachment must not cause irreparable injury to plaintiff, and hardship by granting of injunction must be greatly disproportionate to the hardship caused by the continuance of the encroachment, and this fact must clearly appear in the evidence and be proved by the defendant.

3. Injunction 🔑199

While the trial court, when granting damages in lieu of injunctive relief to plaintiff whose lands have been encroached upon by defendant, may protect the defendant by granting to him affirmative relief, the relief granted should not be greater than is reasonably necessary to protect defendant.

4. Injunction 🔑199

Trial court which granted plaintiff damages in lieu of an injunction against encroachment by purported dividing line wall of defendants committed error when it also gave defendant affirmative relief by quieting title in fee to the area encroached upon, since defendants would have been fully protected by the grant of an easement.

5. Injunction 🔑130

Where findings made by trial court in action by plaintiff for injunction to compel removal by defendants of wall which encroached on plaintiff's land indicated that defendants had been negligent in building the encroachments in reliance on statements of their grantor without procuring survey, and no finding was made on issue whether plaintiff's conduct had contributed to the situation and as to hardships each might suffer, judgment denying injunction and compelling plaintiff to accept damages in lieu thereof, and quieting fee title in defendants to strip in controversy, was unsupported.

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Bert B. Snyder, Santa Cruz, for appellant.

Lucas, Wyckoff & Miller, Santa Cruz, for respondents.

PETERS, Presiding Justice.

Plaintiff and defendants own adjoining parcels of real property in East Ben Lomond, in Santa Cruz County. Defendants constructed certain structures that encroached on plaintiff's land. Plaintiff brought this action for a mandatory injunction to compel removal of the encroachments, for damages for their maintenance, and damages for diversion of water onto plaintiff's land caused by the encroachments. Defendants answered, and cross-complained to quiet their title to the area occupied by the encroachments. The court, after finding that the encroachments had been constructed on plaintiff's land, offered the defendants an election: to accept a mandatory injunction to compel them to remove the encroachments and pay $50 damages, or pay $200 damages, accept an injunction against them prohibiting further diversion of water, and secure a decree quieting their title to the fee of the area involved. The defendants elected the second alternative and judgment was entered accordingly. From that judgment plaintiff appeals.

The facts, more in detail, are as follows: Defendants purchased their lot from one Ladagnous June 27, 1938, the lot being approximately 50 feet by 179 feet. The plaintiff purchased his lot, which adjoins to the north that of defendants, from the same grantor, plaintiff's lot being approximately the same size as that of defendants, on March 3, 1943. The south boundary of plaintiff's property is the north boundary of defendants' lot. Both lots front on Manzanita Avenue. Prior to the time plaintiff purchased his lot, defendants constructed a cement abutment along what they thought was the common boundary between the lots from Manzanita Avenue back 125 feet. Actually, this cement abutment was on plaintiff's land. The encroachment, according to the quiet title decree, measured 3 feet on Manzanita Avenue and decreased to 6 inches at the end of 125 feet, so that the encroachment amounted roughly to a long triangle with a 3-foot base, and 125 feet in length. Although the total area occupied by the encroachments is not fixed in square feet in the findings or the evidence, the parties compute the area as being 229 square feet or about 2½% of plaintiff's total area.

On the cement abutment the defendants constructed a wire fence with steel posts running back from Manzanita Avenue a distance of 77 feet. South of the fence they constructed a driveway about 9 feet wide leading to the garage. The garage is constructed so that its north wall is constructed on the dividing wall. The north wall encroaches onto plaintiff's land from 2.02 feet to 8 inches for a distance of 25 feet. Next, the defendants constructed a badminton court along the dividing boundary, which encroaches from 8 to 6 inches for the 23 feet of its length. Although the evidence is highly confusing on the issue, the trial court found that all of these encroachments, except the garage, were constructed prior to the date plaintiff purchased his lot.

When defendants purchased their lot in 1938 there was an old fence along the north boundary of the lot subsequently purchased by plaintiff, which fence had been constructed in 1905. Defendants were told by Ladagnous that this fence constituted the north boundary of the lot retained by him (and subsequently sold to plaintiff) and that he, Ladagnous, was retaining a 50-foot lot. Defendants accepted this representation and did not have a survey made. This fence was not the north boundary of the lot retained by Ladagnous, but was actually 2 feet north onto the next lot owned by one Paradis. When defendants built the cement wall they measured 50 feet from the Paradis fence and treated that as their north boundary. They fixed the starting point of the wall at a spot on Manzanita Avenue that is 3 feet onto plaintiff's property. Thus, they must have negligently made this measurement because the Paradis fence is only 2 feet off, and the encroachment is 3 feet off. Had they measured accurately, the encroachment would be only 2 feet and there would have been no encroachment at all beyond the garage. There is no explanation in the record as to how this one-foot error occurred.

As already pointed out, plaintiff purchased his lot in 1943 from Ladagnous. At that time the cement curb, according to the findings, had been constructed. Plaintiff testified that about the time he purchased, and while defendants were working along the dividing boundary, he complained to defendants that he believed his frontage on Manzanita Avenue was not a full 50 feet. He also testified that he did not have a survey made because it was impracticable to secure a surveyor during the war. Mr. Tucker, one of the defendants, admitted that such complaint had been made to him in 1943.

The plaintiff paid $250 to Ladagnous as the full purchase price of his lot.

There is no evidence that the encroachment adversely affects any existing use of the land by plaintiff. The plaintiff's property is unimproved except for a garage which is unaffected by the encroachments, and there is no evidence that the encroachments adversely affect the use of this garage. Plaintiff does claim that the encroachments will interfere with his plans for the future development of the property, but there is no evidence of what those plans may be, or how the encroachments may interfere with them. Plaintiff did testify to some damage caused by defendants running a drain pipe so that water and sand were brought onto plaintiff's property, and the sand piled up against the garage, rotting some of the siding and requiring it to be replaced. Apparently, although this is not clear, it is for this damage that the $50 damages allowed in the first alternative form of judgment were granted. However, the judgment enjoins defendants from any further such diversions, and plaintiff, of course, makes no complaint concerning that portion of the judgment. Defendants have not appealed.

The monetary damage that defendants would suffer if compelled to remove the encroachments is not shown by the evidence. Obviously, in such event, they would be compelled to remove the concrete curbing for a distance of 125 feet. The cost of such removal does not appear in the evidence. They would also be compelled to remove a portion of their driveway which extends for the first 77 feet of the encroachment. Defendants claim that if their driveway is thus narrowed it will make it unusable, but this contention is not supported by the evidence. Since the dispute arose between the parties, plaintiff has constructed a fence along the true boundary line between the respective properties. Although this has narrowed the driveway, an automobile can get through, although with difficulty. Moreover, a driveway could be constructed by defendants on the south side of their house where there would be a 9-foot clearance. It should be mentioned that defendants also own the lot to the south which adjoins the lot on which their house is built, and this adjoining lot is unimproved.

Defendants, if an injunction were granted, would also have to remove the north wall of their garage which extends 25 feet along the encroaching curb. This would, undoubtedly, be a material inconvenience and would entail some expense, but the estimated amount thereof does not appear in the evidence. The last 23 feet of the encroachment, if removed, would shorten defendants' badminton court from 6 to 8 inches, which would not be a major inconvenience or cost.

On this evidence the court found that all of the improvements, except the superstructure of the garage, were built before plaintiff purchased his property; that when defendants purchased their lot they were informed by Ladagnous, their grantor, that the Paradis fence constituted the north boundary of the lot retained by him; that when the curbing was constructed, Ladagnous still owned the lot now owned by plaintiff; that while the curbing was being constructed Ladagnous was present and acquiesced in the construction; that while the fence was being constructed, after plaintiff had purchased his lot, plaintiff observed what was being done and acquiesced therein; that nevertheless "defendants were negligent in relying and acting upon the representations and acquiescence of J. P. Ladagnous and the acquiescence of plaintiff * * *, and in not obtaining a survey prior to the construction of said improvements."

The court then found that the area encroached upon was sandy, unproductive, and of "little value," and that the damage to plaintiff did not exceed $50; that it would be "inequitable to compel defendants to remove said encroaching improvements, the value of which exceeds by far the value of the land occupied by said improvements; that plaintiff's proposed use of his said land is for residential purposes and that such use will not be seriously impaired if title to the land occupied by said improvements shall be quieted in favor of defendants." The court then found that $200 would cover all damages, and offered the defendants the option of paying $50 damages and allowing plaintiff a mandatory injunction, or of paying $200 damages, having the mandatory injunction denied except that the water diversion would be enjoined, and defendants' title in fee would be quieted to the area in dispute. Defendants elected the second alternative, and judgment was entered accordingly.

Before discussing the law applicable to this appeal, comment should be made about three major portions of the judgment. First, the judgment not only denies to plaintiff the equitable relief requested by him, but grants to defendants affirmative relief, by quieting title in fee in defendants to land admittedly owned by plaintiff. In the second place, this form of equitable condemnation was granted to private persons even though the trial court found that the defendants were negligent in the construction of the encroachments. In the third place, this relief was granted to defendants on the theory of "balancing the equities," although there is no finding or evidence of what it would cost defendants to remove the encroachments.

There are many cases in California and elsewhere discussing the question as to whether, where a trespass is shown, the trial court has any legal right to deny a mandatory injunction. The cases are in hopeless conflict. There is substantial authority to the effect that the trial court has no discretion in such cases, may not balance the conveniences, or more accurately the hardships, between the parties, and must grant the injunction compelling the removal of the encroachments regardless of the fact that the relative hardship and expense to defendants far outweighs the inconvenience to plaintiff caused by the continuance of the encroachments, except where the trespass is so minor as to fall within the rule of *de minimis.* Bemmerly v. County of Lake, 55 Cal.App.2d 829, 132 P.2d 249; Felsenthal v. Warring, 40 Cal. App. 119, 180 P. 67; Morris v. George, 57 Cal.App.2d 665, 135 P.2d 195; Case v. Sisich, 97 Cal.App. 106, 275 P. 492; Phillips v. Isham, 111 Cal.App.2d 537, 244 P. 2d 716, is the most recent case adopting this theory. In that case the appellate court held that the trial court had erred in permitting the defendant to pay $250 damages to plaintiff as a condition for the denial of a mandatory injunction where a garage encroached 2 feet and a carport 4 feet plus on a 50-foot lot. The carport was unusable if the encroachment were removed. The appellate court gave lip service to the rule that the trial court has some discretionary power in such cases, but held that such discretion only exists where the encroachment is "trivial."

[1] However, the numerical weight of authority in this state recognizes the rule that where the encroachment does not irreparably injure the plaintiff, was innocently made, and where the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, that the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages. Of course, the practical effect of such a rule is to give the defendant, a private person, in certain circumstances, what is, in effect, the right of eminent domain by permitting him to occupy property owned by another. The rule is frequently justified on purely practical grounds because where expensive structures have been constructed that overhang adjoining property or trespass to a minor degree, if the injunction to remove them were granted as of right, the plaintiff would be encouraged to engage in what amounts to legal extortion. Thus in Ukhtomski v. Tioga Mutual Water Co., 12 Cal.App.2d 726, 55 P.2d 1251, which involved an encroachment of 15/100 acre on land worth $150 an acre, and where the encroaching reservoir cost $7,000 to construct, served 500 people, and where damages of $762.41 were allowed, the appellate court affirmed a denial of a mandatory injunction, emphasizing the serious harm to defendant if the injunction were granted, the defendant's inadvertence and innocent mistake in constructing the reservoir, the fully compensatory nature of the damages, and the serious injury to the pub-

lic if the reservoir were ordered removed. In Rothaermel v. Amerige, 55 Cal.App. 273, 203 P. 833, defendant's building encroached 1½ inches, there was a long delay in bringing the action, and the damages to plaintiff were minimal. The trial court granted the injunction and this was reversed, the court clearly adopting the balancing of equities doctrine. In Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 17 P.2d 165, a 2-story building had a wall which overhung plaintiff's property 3⅝ inches, causing $200 in damages, and which would cost $6,875 to remove. The appellate court affirmed the denial of a mandatory injunction, adopting the rule that such an injunction will not be granted when it will operate oppressively, where the encroachment is trifling, the result of an innocent mistake, and where the damage caused to defendant by removal would be greatly disproportionate to the damage caused plaintiff by its continuance. In McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134, where a garage building encroached ½ to ⅝ of an inch onto plaintiff's land and caused but $10 damage at most, the Supreme Court affirmed a denial of the injunction. The court cited, with approval, the case of Rothaermel v. Amerige, supra, and approved the rule that the court will not grant a mandatory injunction "'* * * where the injury is so slight as to bring it within the maxim *de minimis*, or full compensation can be made in damages. If there is an adequate remedy at law, no relief will be granted, especially where there is no appreciable damage, and its issuance would require the performance of an act which would be difficult, and involve a considerable expense.'" 200 Cal. at page 399, 253 P. at page 135.

In Nebel v. Guyer, 99 Cal.App.2d 30, 221 P.2d 337, there was an encroachment of 2 plus feet caused by the wall of a building and overhanging eaves. The denial of a mandatory injunction was affirmed, the court emphasizing the great expense that would be entailed in making the removal, and the fact the area encroached upon was being used only as a flower garden. The court, in effect, found that there was no actual damage, and stated the rule as follows, 99 Cal.App.2d at page 33, 221 P.2d at page 339: "The rule was early recognized that where the encroachment is slight, the cost of removal will be great and the corresponding benefit to the adjoining owner small, or compensation in damages can be had, a court will ordinarily decline to compel removal, and will leave the complaining party to his remedy at law. See 1 Corpus Juris 1209".

In Wright v. Best, 19 Cal.2d 368, 121 P.2d 702, a water pollution nuisance case, the Supreme Court held that the injunction should have been issued because the plaintiff had not proved the facts upon which the balancing hardships doctrine could be predicated, but in so holding recognized the existence of such doctrine, using the following language, 19 Cal.2d at page 386, 121 P.2d at page 712: "But the respondent asserts a right to pollute the creek from the entire Ruby Mine, relying upon the equitable doctrine of the 'balancing of the conveniences.' Under this doctrine, a court of equity may deny injunctive relief and relegate the plaintiff to his remedy at law, if the benefit resulting to him from the granting of the injunction will be slight as compared to the injury caused the defendant thereby. [Citing cases.] Despite a proper showing in other respects of a right to injunctive aid, if a plaintiff is merely seeking to protect a technical and unsubstantial right, and the issuance of the injunction will bring no actual advantage, it may be properly refused where to do otherwise would result in unusual hardship to the defendant or the public."

In Baldocchi v. Four Fifty Sutter Corp., 129 Cal.App. 383, 18 P.2d 682, the court affirmed the denial of a mandatory injunction where 4 feet of a back alley had been taken as a driveway for a garage. The opinion contains considerable language critical of the balancing doctrine, stated that the courts "frown upon the doctrine", but applied it to the case under discussion because the plaintiff, to be entitled to a mandatory injunction, must show "substantial injury" that had to be "real and ascertainable as distinguished from fanciful and imaginary." 129 Cal.App. at page 393, 18 P.2d at page 686. See, also, Mertens v. Berendsen, 213 Cal. 111, 1 P.2d 440.

Most of the legal writers approve the concept that some such concept as balancing conveniences or hardships in connection with the granting or denying of mandatory injunctions in trespass cases should exist, but most recommend that it should not be applied where a substantial right of the plaintiff is involved and unless the disproportionate hardship between the plaintiff and defendant is very great, and unless the encroachment was an innocent one. See, generally, Walsh on Equity, § 55, p. 284, et seq.; de Funiak, Handbook of Modern Equity, § 22, p. 48, et seq.; 5 Pomeroy, Equity Jurisprudence (2d ed.) § 1966, p. 4467, et seq.; McClintock, Discretion to Deny Injunction Against Trespass and Nuisance, 12 Minn.L.Rev. 565; note, 25 Cal.L.Rev. 245.

Section 941 of the Restatement of Torts reads as follows: "The relative hardship likely to result to the defendant if injunction is granted and to the plaintiff if it is denied, is one of the factors to be considered in determining the appropriateness of an injunction against tort." There are several comments by the authors following this section in which it is pointed out that simply because a tort has been committed, and plaintiff has proved that other remedies will not make him whole, an injunction should not issue as of course. It is recommended that the test should be "relative hardship" rather than "balance of convenience." In Comment "b" it is pointed out that, in such cases, the defendant is the wrongdoer and it is his actions that have caused the situation. This is a factor that should be weighed against him. If the plaintiff is partly responsible, such as where he acquiesces and unduly delays, that is a factor that should be weighed against him. This comment also suggests that the defendant's good or bad faith is a factor to be considered.

[2] It is our view that the better reasoned cases hold that in encroachment cases the trier of the fact possesses some discretion in determining whether to grant or to deny the mandatory injunction. In exercising that discretion, and in weighing the relative hardships, the court should consider various factors. It starts with the premise that defendant is a wrongdoer, and that plaintiff's property has been occupied. Thus, doubtful cases should be decided in favor of the plaintiff. In order to deny the injunction, certain factors must be present: 1. Defendant must be innocent —the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant. But where these factors exist, the injunction should be denied, otherwise, the court would lend itself to what practically amounts to extortion.

[3, 4] Now how do these rules apply to the facts of the instant case? In the first place, it should be noted that the trial court not only denied the injunction, but also granted defendants affirmative relief by quieting their title in fee to the disputed strip. While undoubtedly the trial court, where it grants damages in lieu of an injunction may protect the defendant by granting to him affirmative relief, Ukhtomski v. Tioga Mutual Water Co., 12 Cal. App.2d 726, 729, 55 P.2d 1251, the affirmative relief granted should not be greater than is reasonably necessary to protect defendant. In the instant case defendants would have been fully protected by the grant of an easement, and the decree should have gone no further. Under any theory, if defendants should ever abandon the encroachments, the easement should terminate. To quiet title to the fee was error.

[5] There is another material defect in the judgment. The judgment is predicated on a finding that in building the encroachments the defendants were negligent. The court first finds acquiescence by plaintiff, and acquiescence and representations by the former owner of plaintiff's lot, but then finds that defendants were negligent in relying upon such acquiescence and representations without securing a survey. The California cases have clearly held that for a defendant to be entitled to the benefits of the relative hardship doctrine, the trespass must not have been willful, and imply that he must not have been negligent. Thus, in Ukhtomski v. Tioga Mutual Water Co., 12 Cal.App.2d 726, 55 P.2d 1251, 1252, it is stated that the trespass must be the result of "inadvertence and mistake"; in Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 350, 17 P.2d 165, the words "innocent mistake" are used; in Morgan v. Veach, 59 Cal.App.2d 682, 690, 139 P.2d 976, 980, the language is "innocent mistake or oversight"; while in the case of Felsenthal v. Warring, 40 Cal.App. 119, 128, 180 P. 67, 71, the court states that the trespass must be the result of an "innocent mistake of fact" or there must be a "*bona fide* claim of right". In Agmar v. Solomon, 87 Cal.App. 127, 142, 261 P. 1029, 1035, the court stated: "In the present case the court may well have concluded, and the granting of injunctive relief evidences that it did conclude, that the encroachment upon the land of respondents was not the result of accident or mistake, but was placed there with knowledge of respondents' claim of ownership—that Koenig had actual knowledge of such claim, or if he did not have actual knowledge, by the exercise of ordinary diligence he would have acquired such knowledge."

The only case we have found directly discussing the effect of defendant's negligence on the application of the doctrine is Kershishian v. Johnson, 210 Mass. 135, 96 N.E. 56, 36 L.R.A.,N.S., 402. There an owner built the encroachment after knowledge of plaintiff's claim. The court held that he was negligent in not having a survey made under such circumstances, and that such negligence barred him from invoking the balancing doctrine as a defense to the application for a mandatory injunction.

It would appear that if a defendant is negligent, and such negligence is the sole proximate cause of the encroachment, such defendant should be barred from invoking the doctrine. But where plaintiff's conduct also contributes to the situation, then the trier of the facts is entitled to weigh the hardships each may suffer, and the negligence of one against the other. The trial court made no findings on this basic issue. Moreover, the evidence on the issue is not satisfactory. Undoubtedly, the Paradis fence was in existence when defendants purchased their lot. Undoubtedly, Ladagnous, the grantor, told defendants that the Paradis fence constituted the north boundary of the lot retained by him and now owned by plaintiff. Defendants had no survey made but claim to have measured from the Paradis fence when they constructed the cement wall. But admittedly the cement wall constructed by defendants projects 3 feet onto plaintiff's land in front of the lot. The Paradis fence was only off 2 feet. The court also found (and the evidence on this issue is most confused) that the cement wall was built before plaintiff purchased his lot from Ladagnous in 1943. Plaintiff therefore knew of the wall when he purchased. Plaintiff made a mild objection to defendants but had no survey made until 1948, claiming that it was impracticable to secure a surveyor during the war. He did not bring this action until September of 1949. These matters should all be inquired into more fully on the retrial, and more complete findings made on the issues as indicated by this opinion.

The evidence is also unsatisfactory on the question as to the hardship that would be suffered by defendants if compelled to remove the encroachments. There is no evidence at all as to the estimated costs of removing the encroachments. There is evidence that the driveway, which constitutes the first 77 feet of the encroachment, is usable if the encroachment were to be removed. There is evidence that even if the present driveway cannot be used, there are other means of access to the garage possessed by defendants. Obviously, defendants would suffer no material damage (except the cost of removal) by being compelled to remove the encroachment on the badminton court which constitutes the last 25 feet of the encroachment. There would seem to be no reason why at least as to that portion of the encroachment the injunction should not be granted.

It is quite clear that the judgment as it stands is not supported by the findings. Findings were not made on material issues. Justice requires that this case be retried on all issues in accordance with the rules of law announced in this opinion.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

114 Cal.App.2d 577

PEOPLE v. CURLEY et al.

Cr. 2802.

District Court of Appeal, First District,
Division 2, California.
Dec. 5, 1952.

Defendants were convicted in the Superior Court in and for the County of Alameda, O. D. Hamlin, Jr., J., of robbery, and they appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained convictions.

Affirmed.

1. Criminal Law 🔑519(9), 522(1)

Fact that defendant was held for more than twenty hours by police for questioning concerning robberies, and fact that police allegedly threatened to arrest and place codefendant's wife in jail and have her baby taken from her and placed in an institution, did not require that confession be excluded in robbery prosecution, on ground that it was procured by undue pressure.

2. Criminal Law 🔑783(1)

In robbery prosecution, instructions that confession made by one defendant was admissible only against him and not against the other defendant, and that certain evidence was received only against one of the defendants, and that jury should not consider such evidence in connection with the other defendant, properly instructed jury with regard to use of confession made by one of the defendants against the other defendant.

3. Criminal Law 🔑394

In robbery prosecution, evidence was not inadmissible because it was obtained without a search warrant.

4. Criminal Law 🔑706

Where witness for the state in robbery prosecution testified that he loaned gun to one of the defendants on certain date, and date appeared to be different from date witness had previously given police, act of district attorney in claiming surprise and in endeavoring to show date given by witness to police, before district attorney was stopped by the court, did not constitute misconduct, on ground that district attorney was attempting to impeach his own witness, since district attorney had right to show date given by witness to police, and trial court was wrong in refusing to permit district attorney to do so.

5. Robbery 🔑24(1)

Evidence was sufficient to sustain robbery convictions.

◆

Marvin J. Colangelo, San Francisco, for Snider.

Malcolm T. Dungan and Richard S. Haas, San Francisco, for Curley.

Edmund G. Brown, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellants, Alvin Eugene Curley and Gilbert Snider, were charged by information on five counts for robbery. They were tried by a jury, acquitted as to the first count and found guilty on the remaining four. Appellants filed separate notices of appeal from the order denying their motion for a new trial and from the judgment. Counsel appearing for each defendant did not conduct the trial. Both were assigned by this court to prosecute the appeals.

The robberies upon which the five counts were based were alleged as follows:

First Count: On March 27, 1951, about 10:15 P.M. Mr. Sidney R. Sayre, owner and operator of a drug store in San Lorenzo, was accosted at his place of business by two men who took approximately $150 in cash, 300 Delauded tablets (a derivative of morphine) and a partially filled can of Hycodan powder. A flashlight later found in the possession of one of the appellants was claimed to be similar to one used by Mr. Sayre in his business, which was missing after the robbery.

Second Count: On April 6, 1951, two men entered the Bal Theatre as it was being closed for the night and robbed the owner, Reme La Marre, of about $500.

Third Count: On April 6, 1951, Ray C. Thome, Manager of the Bal Theatre, was robbed of $25.

Fourth Count: On April 9, 1951, two men entered the Pioneer Ranch Market in San Leandro and robbed Frank Sunada, an employee, of $2.

Fifth Count: April 9, 1951, George Matsumoto, an employee of the Pioneer Ranch Market, was robbed of $3. On the morning following the robbery the manager of the Pioneer Ranch Market found that the drug department was not in its customary order and subsequently certain cosmetics such as were carried in the drug department were found in the possession of the prosecution witness, Emerick, who explained they had been left with him by appellants.

Appellant Snider bases his appeal on three points:

(1) The circumstances of the custody of appellant by the authorities prior to his being charged with a crime indicate that the detention was contrary to proper official conduct; the confession thereby obtained was involuntary and induced by duress and coercion.

(2) Evidential support for a verdict of guilty was lacking.

(3) The testimony of prosecution witness Roland Leo Emerick was false and improbable.

On his first point appellant states he was held for twenty and one-half hours without any charges being preferred against him, questioned at six different intervals during the day and night and not apprised of his right to counsel. That in order to obtain a confession from him he was told that unless he answered certain questions the wife of his codefendant would be put in jail and their infant baby taken from them. (Although the State denied that there were any threats made to Snider to induce him to make a confession there is evidence that Mrs. Curley was threatened with arrest, jail and having her baby taken from her and placed in an institution in attempting to get her to reveal what she knew of the robberies, of which she said she knew nothing.) Snider claims that after this threat he answered every question with a simple "yes" but refused to sign the statement which was constructed from these answers. Appellant claims the statement was introduced at the trial, over the objection of appellant's trial counsel, as a voluntary confession.

On the second point it is argued that the only victims of the robberies who attempted to identify the men were Thome and La Marre and that their identification was not positive and definite. It is also alleged that there was a complete failure of proof of weapons used.

The third argument made by appellant Snider is concerned with the veracity and credibility of the testimony of prosecution witness Roland Leo Emerick. It was pointed out that Emerick was picked up in the first instance on suspicion of having committed the crimes. He owned clothing similar to that described as being worn by the men committing the robberies; the stolen goods were found in his apartment; he was an addict. With such evidence against him, appellant asserts, Emerick had every reason to attempt to shift the crime on to the appellants, to manufacture an alibi and to claim his knowledge of the details of the robberies was obtained from Snider who related them to him. Appellant claims the testimony of Emerick was unworthy of belief and should have been totally disregarded as evidence.

In a separate appeal appellant Curley sets forth the following points in his argument:

(1) Errors relating to the alleged confession of Snider. Appellant contends that the confession was obtained by means of prolonged and repetitious questioning and by threats of reprisals against Mrs. Curley; that the jury was not properly instructed with regard to the use against appellant Curley of Snider's confession to the police or of the alleged confession of Snider to Emerick, the prosecution witness. Furthermore appellant argues that the jury was either confused or misled with regard to the alleged confession to the police or arrived at its verdict by chance or compromise in that it returned an identical verdict as to both defendants but contradictory as to the robberies as to which the evidence was almost precisely the same, i. e., acquittal as to the drug store robbery but conviction as to the market robbery, though both were included in the alleged police confession and the evidence was as strong for one as the other.

(2) The wholesale admission of evidence illegally obtained prejudiced appellant Curley and violated federal constitutional rights. Curley's home and automobile and Snider's home were searched without warrant and the property so seized was admitted in evidence over objection.

(3) Errors relating to instructions. Appellant argues the instruction as to the elements necessary to convict him of robbery were vague and did not limit the proof to the allegations in the information; there was a failure to instruct the jury properly as to the effect of evidence relating to possession of stolen property and as to the degree of proof necessary to a conviction.

(4) Misconduct of the prosecutor.

(5) Insufficiency of the evidence to support the verdict.

(6) Substantial and prejudicial errors at the trial resulting in a miscarriage of justice.

The Curley Appeal.

[1] Thus appellant advances a well reasoned argument tending to show that the confession of his codefendant was procured by undue pressure on the part of the police. The facts upon which he relies are that Snider was held for questioning more than twenty hours during which he was threatened with reprisals against the wife and child of his codefendant. The difficulty with the argument is that the facts are all disputed by witnesses for the State. Particularly it was shown that Snider's confession was taken at about 9 A.M. and that nothing was said or done about Mrs. Curley's probable arrest until sometime that evening. Furthermore there was no relation between Mrs. Curley and Snider and no reason is given how her difficulty with the police could affect Snider or how her probable arrest could have induced Snider to make the confession. In this confession Snider volunteered the information that when he and Curley went to the latter's home after one of the burglaries, Curley's wife was there and was told where the money came from and how they got it. She watched the two divide the money. It was after this information was given the police by Snider that Curley's wife was threatened with arrest as an accessory after the fact. These circumstances lead to this appellant's contention that the admission in evidence of Snider's confession was prejudicial to Curley. The sequence of events disputes the claim of this appellant that the confession was improperly received in evidence. People v. Castello, 194 Cal. 595, 601, 229 P. 855; People v. Mehaffey, 32 Cal.2d 535, 548, 197 P.2d 12.

[2] Then it is argued that the jury was not properly instructed with regard to the use against him of the confession of Snider. The instruction, given during the course of the trial, reads: "Any statements made by

one defendant are admissible only against the defendant making the statement. In other words, if this appears to be a statement by the defendant Snider, it is admissible only as against the defendant Snider and not against the defendant Curley." In its general instructions the court advised the jury that the court's ruling admitting the alleged confession in evidence was not binding on the jury but that it should decided independently "whether or not it was a voluntary confession," but, more specifically that: "During the trial certain evidence was received against only one of the defendants. Such evidence may be considered by you only when considering the case of the defendant in respect to whom that evidence was received, and must not be considered in connection with the case of the other defendant." We find no error here.

The same may be said as to the instructions relating to the testimony of Emerick covering Snider's confession to the witness that he (Snider) and Curley had committed the robbery. In Emerick's possession the police found a large supply of the articles which had been taken from the various stores entered. Also a pinch bar that had been used by one of the defendants in the theatre robbery—the bar having been placed at the back of one of the victims who was told that it was a gun. It was urged by both defendants that Emerick alone had committed the robberies and had involved the defendants through some arrangements with the police which is not made clear. However, both defendants were given full leeway in developing their theories which the jury refused to accept. The jury was properly instructed as to the use of this evidence.

[3] The usual criticism is made of the use by the State of evidence alleged to have been obtained without a search warrant. The difference between the federal rule and the California rule has been frequently discussed but the holding in People v. Mayen, 188 Cal. 237, 245, 205 P. 435, 24 A.L.R. 1383, that such evidence is admissible has been consistently followed in this state. See People v. Gonzales, 20 Cal.2d 165, 168–169, 124 P.2d 44; People v. Kelley, 22 Cal.2d 169, 172, 137 P.2d 1.

Criticisms of the instructions relating to the elements of robbery, the possession of stolen property, and the necessary degree of proof are without merit.

[4] Criticism of the conduct of the district attorney relates to his attempt to impeach his own witness. The witness testified as to the date of a conversation he had had with Curley in which he had loaned the latter a gun. The date seems to have been different from that the witness had previously given the police. The district attorney claimed surprise and endeavored to show it. In this he was stopped by the court. There was no misconduct. The district attorney was right in his effort to produce the testimony and the trial court was wrong in its ruling. The rule applicable to situations of this kind is found in People v. Flores, 37 Cal.App.2d 282, 286, 99 P.2d 326.

[5] The question of the sufficiency of the evidence is not difficult. The two defendants, as charged in the second count, robbed a theatre attendant after closing time in the presence of another attendant. Both of these identified the defendants and testified as to the use of a gun and the crow bar. The latter was jammed into the back of one of the attendants to simulate a dangerous weapon. After the defendants had tied the attendants and placed them on the floor they took about five hundred dollars from one and about twenty-five dollars from the wallet of the other. The third count relates to the latter incident. The testimony of these witnesses is clear and without substantial conflict. The fourth and fifth counts relate to the robbery of two attendants of a Japanese market a few days later. The defendants were identified by the clothing and general appearance, and the evidence of their guilt is clear.

The appellant Snider relies on many of the points raised by his coappellant. He stresses the alleged pressure put on him to induce him to confess. All his testimony on this subject was denied by those who did the questioning. The jury was properly instructed and impliedly found that his testimony was untrue.

In addition this appellant argues that the testimony of the State's witness Emerick was false and improbable. This was simply a question for the jury to decide under the instructions which fully covered all the issues.

Counsel for both appellants have shown much industry on behalf of the appellants but we are unable to find that any of the points raised were prejudicial to a fair trial.

Judgments and orders affirmed.

GOODELL and DOOLING, JJ., concur.

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114 Cal.App.2d 496

JONES v. EVARTS et ux. (two cases).

Civ. 19170, 19271.

District Court of Appeal, Second District, Division 1, California.

Dec. 2, 1952.

Rehearing Denied Dec. 29, 1952.

Hearing Denied Jan. 22, 1953.

Action to quiet title and for an accounting. The Superior Court, Los Angeles County, George Francis and Joseph Raycraft, Judges, entered judgment for plaintiff, and defendants brought two appeals, consolidated for decision, from orders denying motion to set aside default and motion to permit inspection of documents and from judgment entered subsequent to default. The District Court of Appeal, Drapeau, J., held that where application for relief from default was not made until more than eight months after entry of default, and hearing on motion was not had until more than ten months after default, the trial court was precluded from setting aside default.

Appeal from order denying motion to permit inspection of documents dismissed, orders denying motions to set aside default and judgment affirmed.

1. Appeal and Error 🔑123

Where defendants filed motions to set aside default and for order permitting inspection of accounts and documents, and no order was made denying motion to permit inspection of documents, appeal on that motion would be dismissed.

2. Judgment 🔑153(1)

Where application for relief from default was not made until more than eight months after entry of default, and hearing on motion was not had until more than ten months after default, the trial court was precluded from setting aside default. Code Civ.Proc. § 473.

3. Appeal and Error 🔑907(3)

Where there was no reporter's transcript of evidence presented at trial, it would be assumed by District Court of Appeal that evidence was sufficient to support findings of fact.

◆

Elon G. Galusha, Los Angeles, for appellants.

John G. Clock of Clock, Waestman & Clock, Long Beach, for respondent.

DRAPEAU, Justice.

Both of these appeals arise out of the same action and have been consolidated for decision by this court.

The appeal in No. 19170 is from orders denying (1) motion to set aside a default; and (2) motion to permit inspection of documents.

The appeal in No. 19271 is from the judgment entered subsequent to the default.

The record on appeal is incomplete in that the pleadings are not included. However, findings of fact which are the basis of the judgment appealed from disclose:

That plaintiff owned a piece of realty in Long Beach subject to an F. H. A. loan for $3416.77, evidenced by a trust deed. In August of 1944, he sold this property to defendants for $4400. Under the purchase agreement, defendants were to assume the trust deed, pay $300 in cash and the deferred balance of $683.23, with interest at $6.6% per annum. Monthly payments on both the trust deed and the deferred payments were provided for until full payment of the latter. At that time, defendants' liability for payment of the trust deed was to be substituted for plaintiff's liability therefor, after defendants had obtained approval of F. H. A. Failure to so perform was to result in cancellation of the provision for assumption of the loan as a part of the purchase price. Defendants paid until June 2, 1948. On August 26, 1948, they were notified in writing by plaintiff of cancellation of the assumption clause in the agreement, at which time plaintiff demanded payment to him of the sum of $3336.34 in monthly payments. Defendants refused and failed to comply with the terms of the notice.

The usual judgment quieting title in plaintiff followed. This was entered on February 20, 1952. In the meanwhile, the default of defendant Eugene F. Evarts was duly entered, to-wit: on March 6, 1951.

Trial was had on January 25, 1952. On that date, defendants' motion to set aside default on the ground of mistake, surprise and incapacity of their attorney, was argued and denied. On January 28, 1952, the following minute order was made: "Motion of defendant to set aside default against defendant and motion of defendant for order permitting inspection of accounts and documents come on for hearing and are ordered off calendar."

[1] Since no order was ever made denying appellants' motion to permit inspection of documents, that appeal should be dismissed.

The default herein was taken on *March 6, 1951.* According to respondent's brief, "On *November 21, 1951,* appellant Eugene F. Evarts, gave a notice of motion to set aside his default, which he set for hearing on December 4, 1951, and on that day appeared in person, argued his motion, and it was denied." That proceeding is not included in the record now before this court.

However, the clerk's transcript herein discloses that on *January 14, 1952,* said appellant filed notice of motion to set aside the default taken against him together with an affidavit of merit and proposed answer. When the cause was called for trial on January 25, 1952, this motion was the first matter disposed of. It was denied by the trial court.

Application for relief under section 473, Code of Civil Procedure "must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."

[2] In the instant case, "the trial court could not relieve defendant from the entry of the default because the motion under section 473 was not made within six months after the entry of default. Phillips v. Trusheim, 25 Cal.2d 913, 917, 156 P.2d 25; Hunt, Mirk & Co., Inc. v. Hesperides Mining Co., 200 Cal. 382 [383], 384, 253 P. 317; Title Ins. & Trust Co. v. King, etc., Co., 162 Cal. 44, 46, 120 P. 1066." Bowman v. Bowman, 29 Cal.2d 808, 813, 178 P.2d 751, 754, 170 A.L.R. 246. This for the reason that the motion under consideration was not noticed until more than ten months had elapsed after the default was taken. And the application for relief made on November 21, 1951, was not made until more than eight months after entry of said default.

On their appeal from the judgment quieting title to the property in respondent, appellants urge:

1. That the court erred in overruling the first part of the demurrer;

2. That the court should have sustained the second part of the demurrer;

3. That this court is not bound by the trial court's interpretation of certain documents;

4. That the court should have ruled that a tender of a deed by the seller was necessary to quiet the title;

5. That there was no conflict in the evidence, hence the findings are merely conclusions of law, and not binding on this court.

[3] As hereinbefore stated, the record on appeal is incomplete. It contains neither a copy of the complaint nor of the demurrer directed thereto. It does not contain any documents which this court might

interpret. There is no reporter's transcript of the evidence presented at the trial, and in the absence thereof, it must be assumed that such evidence was sufficient to support the findings of fact.

As stated in Evarts v. Myers, 112 Cal. App.2d 210, 245 P.2d 1119: "An appellate court will not consider statements in briefs which are made up of matters outside the record."

For the reasons stated, the appeal from the purported order denying motion to permit inspection of documents is dismissed; the order denying appellants' motion to set aside the default, and the judgment appealed from are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

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114 Cal.App.2d 710

STATE v. THOMPSON et al.

Civ. 4511.

District Court of Appeal, Fourth District, California.

Dec. 12, 1952.

Proceeding by State to condemn real property. The Superior Court, San Diego County, William A. Glen, J., after jury fixed value of property, entered judgment for plaintiff, and a defendant appealed. The District Court of Appeal, Griffin, J., held that instruction that jury, in assessing damages, should not consider costs of proceedings, which costs, under law, would be borne by state, was not calculated to direct jurors' minds to consideration or estimation of costs, but was a proper admonition to dismiss from their minds the entire matter of costs, and refusal to modify instruction by explaining that costs, as so used, did not include attorney's fees, was not prejudicial error resulting in miscarriage of justice.

Judgment affirmed.

Eminent Domain ⟜222(5), 262(5)

In condemnation proceeding, instruction that jury, in assessing damages, should not consider costs of proceeding, which, under law, would be borne by state, was not calculated to direct jurors' minds to consideration or estimation of costs, but was a proper admonition to dismiss from their minds the entire matter of costs, and refusal to modify instruction by explaining that costs, as so used, did not include attorney's fees, was not prejudicial error resulting in miscarriage of justice. Const. art. 6, § 4½.

Vincent Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and John F. Hassler, Jr., Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Plaintiff and respondent sought to condemn several parcels of real property for the use of San Diego State College. Defendant and appellant Cape Cottage Homes, Inc., was the owner of parcel 3, whose expert witnesses appraised it between $50,000 and $72,000, and respondent's witnesses between $35,000 and $37,500. After five days of trial the jury fixed the value at $37,500.

The sole point raised on this appeal is that since the court gave a certain instruction requested by respondent, i. e.

> "In assessing the amount of compensation to which the defendants will be entitled in this case, you are not to take into consideration the amount of costs of these proceedings, as under the law the owners cannot be required to pay any portion of the costs. The plaintiff, the people of the State of California, is required to pay the costs. The matter of costs will be considered by the court after you shall have returned your verdict, and is not for your consideration in this case";

the court erred in refusing to thereafter give a modification of such instruction requested by appellant, i. e.,

"* * * The word 'costs' as used in the foregoing instruction does not mean or include attorneys' fees."

The record indicates that counsel for the appellant did not have knowledge that the court was going to give the instruction offered by the respondent until after it was given. After the jury retired, he moved the court that it further instruct the jury as requested. This request was denied. Appellant takes exception to the ruling of the court in refusing to give the instruction requested, and assigns it as prejudicial error. It concedes that the jury was properly instructed as to the item of costs, but argues that it had the right to have the word "costs", as used in the instruction, interpreted so the jury would not believe that attorney's fees and expert witness fees were included in that instruction; that since in Pacific Gas & Electric Co. v. Chubb, 24 Cal.App. 265, 141 P. 36, serious consideration was given to the question as to whether the term "costs" included attorneys' fees, a lay jury might well have been misled and believed that it did, and accordingly, the instruction given would form a bias against the defendant landowner if the members of the jury believed that the costs of the testimony of all of the expert witnesses and the fees for the attorneys for the landowners were being paid by the State of California, citing such cases as Formosa v. Yellow Cab Company, 31 Cal.App.2d 77, 84, 87 P.2d 716; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36; and Jaynes v. Jaynes, 98 Cal.App.2d 447, 220 P.2d 598.

Both sides concede that they have found no case precisely in point. It is likewise conceded by both parties that unless provision is made therefor by statute, the claimant is not entitled to reimbursement either for loss of time consumed in prosecuting his claim or for counsel fees, citing 4 Nichols on Eminent Domain, 3d Ed. 1951, Sec. 14.249(1), page 425; and City of Los Angeles v. Moyer, 108 Cal.App. 4, 290 P. 1073.

A fair interpretation of the effect of respondent's instruction, as given, without modification, was not calculated to direct the jurors' minds to a consideration or estimation of costs. On the contrary, the accomplished objective was a proper admonition to dismiss the entire matter of costs from the minds of the jurors. By other instructions it was told that its sole duty was to determine the market value of the land. Costs are not an element of market value, and the jurors were so instructed. The court by the instruction did not inform the jury that *all costs* were borne by the respondent. It expressly told it that costs *of the proceedings* were so borne. The proposed amendment only included within its terms the attorneys' fees of appellant. Had the proposed amendment been given in the form suggested, it may have led the jurors to believe that the landowner should be made whole in respect to such attorneys' fees and that they were in good conscience expected to enhance the rule to conform to the idea. If the court deemed it advisable to give such an instruction pertaining to costs it might well have defined the costs allowable under the law. However, we are convinced that the refusal to give the instruction as proffered did not result in prejudicial error to the appellant. It does not appear that a miscarriage of justice resulted. Article VI, sec. 4½, Constitution.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

PETERS v. CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 15037.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1952.

Hearing Granted Jan. 22, 1953.

Action by pedestrian against City and against landowners for injuries received when pedestrian fell on portion of concrete sidewalk in front of landowners' premises which had been altered by landowners' predecessors in title so as to carve therein a driveway leading into a garage, which driveway was used primarily for benefit and convenience of landowners. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment against the City but in favor of landowners, and plaintiff and City appealed. The District Court of Appeal, Goodell, J., held that duty was upon defendant land-owners to maintain such portion of the sidewalk in a safe condition, and that instructions which in effect transferred such burden of responsibility onto defendant City were prejudicially erroneous.

Judgment reversed and cause remanded for new trial.

1. Municipal Corporations ⚷808(1)

Generally, in absence of statute, a landowner is under no duty to maintain in safe condition a public street abutting his property, but such landowner is liable for condition of portion of public sidewalk which he has altered or constructed for benefit of his property and which serves a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed.

2. Municipal Corporations ⚷808(1)

Duty of landowner to maintain portion of public sidewalk which he has altered or constructed for benefit of his property and which serves a use independent of and apart from ordinary and accustomed use for which sidewalks are designed, runs with the land and therefore a property owner cannot avoid liability on ground that condition was created by his predecessors in title.

3. Appeal and Error ⚷1067
Municipal Corporations ⚷822(2)

In action by pedestrian against landowners for injuries sustained when pedestrian fell on portion of cement sidewalk in front of landowners' property which had been altered to create driveway into premises for private use, convenience and benefit of landowners, refusal to instruct that landowners would be liable for injuries sustained by others for any defective or dangerous condition of driveway amounting to negligence proximately causing accident, providing injured party is free of contributory negligence, was prejudicial error.

4. Municipal Corporations ⚷808(1)

The liability of abutting property owner for a condition of the sidewalk maintained for his sole and exclusive use and benefit is a liability imposed under common law principles of negligence and nuisance.

5. Municipal Corporations ⚷755(1)

The liability of a municipality for the dangerous or defective condition of a sidewalk is a statutory liability.

6. Appeal and Error ⚷882(12)

Appellant could complain of erroneous instruction injuriously affecting his rights and for which he was not responsible.

7. Appeal and Error ⚷1064(1)

In action by pedestrian against city and against landowners for injuries sustained when pedestrian fell on cement sidewalk in front of landowners' property, instructions which in effect transferred owners' burden of responsibility onto city were highly prejudicial to city, in view of fact that owners' liability was an original responsibility entirely separate from and independent of city's obligation to keep sidewalk in proper repair.

8. Municipal Corporations ⚷808(1)

Landowners' duty to maintain in a safe condition portion of public sidewalk abutting upon his property which he has altered or constructed for his sole and exclusive use and benefit, does not arise from statute or ordinance, nor does it have to be brought into operation by the service of any notice by the city.

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Fitz-Gerald Ames, Sr., San Francisco (Guernsey Carson, San Francisco, of counsel), for appellant Carrie C. Peters.

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* Subsequent opinion 260 P.2d 55.

Dion R. Holm, City Atty., and Lawrence S. Mana, Deputy, San Francisco, for appellant City and County of San Francisco.

Daniel C. Miller, San Francisco, Anna White Garlund, San Francisco, for respondents Duque.

GOODELL, Justice.

In the early afternoon of March 12, 1947, which was a clear day, the plaintiff while walking northerly on the sidewalk in front of an apartment house on the easterly side of Twelfth Avenue in San Francisco, fell and was seriously injured. She sued for damages, joining as defendants the City and County of San Francisco and the owners of the apartment house, on the ground that the sidewalk was dangerous and defective. The jury awarded her $12,500 against the City but brought in a verdict in favor of the owners. The City's motion for judgment notwithstanding the verdict was denied. Both the plaintiff and the City moved for a new trial and on its denial both appealed.

The sidewalk, which is 15 feet wide, was laid before the house was built. When the structure was built or soon after in 1919 the sidewalk was altered so as to carve therein an automobile runway leading into a garage. (There is another runway not involved herein.) For a distance of 8 feet and 5 inches inward from the curb the sidewalk is relatively flat, but the depressed part of the runway then extends on a gradual slope downward (a distance of 6 feet and 7 inches) to the building line, at which point its depth is 11 inches below the normal sidewalk level.

The application for a building permit filed on June 6, 1919, by the then owner of the property contains the following:

> "I hereby agree to save, indemnify and keep harmless the City and County of San Francisco against all liabilities, judgments, costs and expenses which may in any wise accrue against said city and county in consequence of the granting of this permit, or from the use or occupancy of any sidewalk, street or sub-sidewalk placed by virtue thereof, and will in all things strictly comply with the conditions of this permit, and the Building Law."

From the time the house was built to the time of the accident, through changes in ownership, the runway remained just as it was "created" in 1919 by the then owner. The defendant-owners when they acquired the property in 1940 found it as it was originally built and left it that way.

The plaintiff's appeal.

The plaintiff's principal contention on her appeal from that part of the judgment which is in favor of the defendants Jeanne and Marie Duque is that there was prejudicial error in giving the following instructions:

> (a) "Now, the sidewalk that was involved in the accident under consideration in this case was not the property of the defendants Duque, but was property that had been dedicated to the public as a sidewalk and belonged to the City and County of San Francisco. No affirmative duty rested on said defendants Duque as the owners of property abutting said sidewalk or otherwise to keep the sidewalk in a safe condition, but our law does provide that when the owner of property abutting a sidewalk creates, by some positive action, a condition which is likely to cause harm to persons lawfully using the sidewalk, and a person so using the walk is injured as a proximate result of such condition, the property owner is then liable for that injury, in the absence, of course, of contributory negligence. If the plaintiff in this case has any lawful claim for damages against the defendants Duque, that claim must rest on the principle of law just stated to you, and on facts which, if existent, evoke that principle under the rule stated."
>
> (b) "You are instructed that, in this state, there is no obligation on the owner of property abutting upon a public street or sidewalk to keep such public street or sidewalk adjoining his premises in repair, or in a safe condition for public travel, except where

> there is a statute or ordinance imposing such a duty upon him, or where such owner created, through use or otherwise, some unsafe condition."

[1, 2] The statement that no affirmative duty rested on the owners etc. is not (in the circumstances of this case) a correct statement of the law, and the statement with respect to the creation of the hazardous condition by the owner "by some positive action", is misleading since it implies that only in case the dangerous condition was created by the owners then before the court, could they be held liable. Such is not the law.

That an affirmative duty does rest on the owner in circumstances such as those presented herein is held in the case of Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 438, 59 A.L.R. 435, where the owner constructed a plank driveway across the sidewalk area in front of her property so that trucks could drive in and out. The nails or spikes in the planks became loosened by wear and tear and protruded above the surface. A pedestrian tripped on one of them and was seriously injured. She sued the owner, for whom the trial court directed a verdict. In reversing the court said:

> "This driveway having been thus constructed and used not primarily for sidewalk purposes but for the benefit and convenience of the said defendants in connection with their adjacent property and which use was one which was independent of and apart from the ordinary and accustomed use for which sidewalks are designed, the duty was cast by law upon the defendants to exercise reasonable care and diligence in the keeping of said driveway at the point where it was superimposed upon said sidewalk in a proper and safe condition for the passage of pedestrians rightfully using said sidewalk and said driveway superimposed by defendants thereon. (Citations.)"

That holding was re-affirmed in Sexton v. Brooks, 39 Cal.App.2d 153, 157, 245 P. 2d 496, 498, (on June 26, 1952, just after these appeals were first argued) where the court said:

> "It is the general rule that in the absence of statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property. Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; Schaefer v. Lenahan, 63, Cal.App.2d 324, 146 P.2d 929; see note 93 A.L.R. 800–803. There is, however, an exception to this rule, * *. It has been held that an abutting owner is liable for the condition of portions of the public sidewalk which he has altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed. Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435 (plank driveway across sidewalk area); see, generally, notes in 62 A.L.R. 1067–1073; 59 A.L.R. 441–443. The duty to maintain such portions of the street runs with the land, Monsch v. Pelissier, 187 Cal. 790, 793, 204 P. 224, and a property owner cannot avoid liability on the ground that the condition was created by his predecessors in title. Nickelsburg v. City of New York, 263 App.Div. 625, 34 N.Y.S.2d 1, 2–3; Kniffley v. Reid, 287 Ky. 212, 152 S.W.2d 615; Herron v. City of Youngstown, 136 Ohio St. 190, 24 N.E.2d 708, 710; Joel v. Electrical Research Products, Inc., 2 Cir., 94 F.2d 588. Any suggestion to the contrary in Daly v. Mathews, 49 Cal.App.2d 545, 548, 122 P.2d 81, is disapproved."

The only difference between the Granucci case and the present one is in the mode of the alteration of the sidewalk; the cases are parallel.

The respondent owners say that "The court's instructions * * * were based upon the case of Daly v. Mathews". They close their brief with the assertion "that Daly v. Mathews * * * properly states the law applicable to this case" but Sexton v. Brooks holds otherwise.

We must hold, on the authority of Granucci v. Claasen and Sexton v. Brooks and the cases they cite, that the two instructions were prejudicially erroneous.

[3] Plaintiff also claims that it was error to reject the following instruction which she tendered: "Where the owners of property abutting on a sidewalk constructed, maintained or used a driveway extending out into the said sidewalk, not as a sidewalk, but primarily as a driveway into the premises of said property owner, and for their private use, convenience and benefit, said abutting property owner is liable for injuries sustained by other persons, for any defective or dangerous condition of the driveway, amounting to negligence proximately causing the accident and injuries sustained, providing the injured party is herself free of contributory negligence proximately contributing to the happening of the accident." We agree with appellant that there was prejudicial error in refusing this instruction.

The City's Appeal.

The City was brought into this case by the following allegation: "That the defendants, and *each of them,* at all of the times herein mentioned and for some time prior thereto, caused to be constructed and maintained adjacent to, and immediately adjoining said building * * * a garage driveway and sidewalk; that all of said premises are, and were at all times herein mentioned, used by the public as sidewalks" and that all the defendants maintained the sidewalk and driveway in a defective and dangerous condition. (Emphasis added.)

The verdict reads: "We, the jury * * find a verdict in favor of plaintiff and against defendant City and County * * in the sum of $12,500; and find a verdict in favor of defendants Marie Duque and Jeanne Duque and against plaintiff".

[4, 5] We agree with the City that "The liability of the abutting property owner for a condition of the sidewalk maintained for his sole and exclusive use and benefit is a liability imposed under common law principles of negligence and nuisance, and has long been recognized in California. The liability of a municipality for the dangerous or defective condition of a sidewalk is a statutory liability arising under the Public Liability Act of 1923."

The City says (and we assume it to be correct) that "The instant case is the first on appeal since the enactment of the Public Liability Act of 1923 where the question of the respective liability of a city and of an abutting owner arising from an alleged dangerous or defective condition of a sidewalk created or maintained for the benefit of the abutting property is involved in a case where both the municipality and the abutting owner are parties defendant."

The City contends that "The liability of the City in this case, because it is in fact a derivative liability arising from the use of the sidewalk and driveway made by the abutting property owner, can only be established if liability of the abutting property owner is established, in which latter event the City would be entitled to complete indemnification from the abutting property owner." It is not necessary to decide this question. It is sufficient to note that two of the authorities cited approvingly in Sexton v. Brooks (in support of another point, however) indicate that such is the rule, Herron v. City of Youngstown, 136 Ohio St. 190, 24 N.E.2d 708, 710 and Nickelsburg v. City of New York, 263 App.Div. 625, 34 N.Y.S.2d 1, 2–3, and that Dillon on Municipal Corporations, Vol. IV, secs. 1725–1728 so indicates. Section 1727 of Dillon, dealing with this type of case, reads:

> "*Ultimate Liability.*—The ultimate liability in such cases is upon the author or continuer of the nuisance; but if the party injured elects to proceed against the municipal corporation for failing in its duty to keep the streets and sidewalks in a safe condition for public travel, and there is no statute dispensing with notice as a condition of liability, he must show notice to the corporation of the obstruction or defect, or at least, neglect of duty in not ascertaining it. If the person injured fail in his action against the municipality, this is no bar to an action by him against the author of the nuisance."

Section 1728 reads: "*Action over.*—If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrongdoer, as between itself and the author of the nuisance; and if the latter had notice of the pendency of the action against the municipality, and could have defended it, he has been held to be concluded as to the existence of the defect or nuisance in the street, and as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damage or injury it occasions. * * *"

The City cites many other authorities supporting these views but, as indicated above, there is nothing in this case requiring a decision of the questions discussed by Dillon.

The only question which need be decided herein is whether the instructions tendered by the defendant owners, admittedly based on Daly v. Mathews, on which the judgment must be reversed on plaintiff's appeal, may be urged by the City as grounds for reversal of the judgment against the City.

[6] With respect to instructions given at the request of non-appealing co-defendants and not by an appellant's adversary, the court in Martinelli v. Poley, 210 Cal. 450, 459, 292 P. 451, 455, had this to say:

> "We do not understand, however, that this fact would make any material difference as to the force or effect of the instruction. If it was given by the court, *the jury were justified in acting upon it, and the consideration given to it by the jury would be the same whether the instruction was given at the request of one party to the action or of the other. The error in either case, if the instruction were erroneous, would be the same,* except that the party who offers the instruction cannot complain of the action of the court in giving it. We think the appellant as he was not in any way responsible for the giving of the instruction, has the right to complain of any erroneous statement of law contained therein which injuriously affected his rights in the action or trial." (Emphasis added.)

There is no doubt that instructions (a) and (b) injuriously affected the rights of the City. In presenting the plaintiff's appeal her counsel said: "These instructions amounted in effect to a direction by the judge to bring in a verdict for the defendants Duque."

In Monsch v. Pellissier, supra, 187 Cal. 790, 793, 204 P. 224, 225, the Supreme Court said: "As we view the liability of the defendant under the facts as stated in the amended complaint, it is entirely separate from, and independent of, the city, and the latter's obligation to keep the sidewalk in proper repair. It is an original responsibility resting upon defendant to keep the gratings and lights in a condition which will render the sidewalk, of which they form a part, reasonably safe for use by those who may pass over it."

[7] If the owners' liability "is entirely separate from, and independent of, the City, and the latter's obligation to keep the sidewalk in proper repair" and an "original responsibility" then, certainly, instructions (a) and (b) which in effect transferred the owners' burden of responsibility onto the City, were highly prejudicial to the latter.

[8] The City attacks another instruction which was given at the owners' request reading as follows: (c) "You are instructed that, in this case, the ordinances and statutes which, by their operation, might place a liability upon the defendants Duque for any condition existing upon the streets or sidewalks at the place where this accident is alleged to have occurred, require that a notice to repair be first given to those defendants by the City and County of San Francisco, or its designated agents. You are instructed that there is no evidence in this case that the notice required to place such liability upon the defendants Duque was ever given to them."

This instruction contained an incorrect statement of the law since the owners' duty does not arise from statute or ordinance nor does it have to be brought into operation by the service of any notice by the City. Moreover, it erroneously injected the City into the owners' case. When the instruction told the jury that no such notice had been proved, it told them in effect that no such duty had arisen.

We must hold that the giving of instructions (a), (b) and (c) were just as prejudicial to the City as to the plaintiff, and that the judgment must be reversed on the City's appeal for the reasons and on the authorities found under the first heading.

The City has still another ground of appeal. It tendered, but the court rejected, the following instructions:

> (d) "Where an owner of property makes use of the sidewalk for his own purpose, as for instance as a garage entrance, he must exercise reasonable care to keep the sidewalk in a reasonably safe condition, and the city authorities, in the absence *if* [of] notice to the contrary, are entitled to assume that the property owner is performing his duty in this respect."
>
> (e) "Where the owner of property maintains a driveway on the sidewalk in front of his premises, he is liable for injuries proximately caused by his negligence in maintaining such driveway, in the absence of contributory negligence of the plaintiff."

The refusal of these two instructions accentuates the error in giving instructions (a), (b) and (c), since they are entirely inconsistent with (d) and (e) which at least partially announce the correct rule as restated in Sexton v. Brooks.

There is no reason to discuss any other points.

Since a new trial is inevitable we must assume that instructions will be given therein conforming to the rules stated in Sexton v. Brooks, supra, and in the earlier cases which it cites, without regard to the form of the instructions in this record tendered by the plaintiff and the City and rejected by the court.

The judgment is reversed and the cause remanded for a new trial as to all the defendants.

JONES, J. pro tem., concurs.

NOURSE, Presiding Justice (concurring).

I concur in the order of reversal as to the City and County of San Francisco but for reasons not stated in the main opinion. The City's motion for a directed verdict should have been granted. The complaint did not state a cause of action as to the City. The plaintiff did not prove that the City had notice or knowledge of any defect in the sidewalk or of any dangerous condition resulting from its use. This is a prerequisite of recovery from the City under the public liability statute. Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990, so holds. It has been followed consistently.

As to the respondent property owners I would affirm the judgment. Plaintiff's statement of the cause of her injury was that "her foot unexpectedly slipped into the drop in the sidewalk caused by a driveway having been cut into the sidewalk in order to serve the Duques' garage." She confines her appeal to errors in the instructions. These are fully discussed in the main opinion. That discussion is academically sound but basically uncontrolling. Errors in instructions cannot support a reversal if the case made demonstrates that they were nonprejudicial. Here the accident occurred on a clear, sunny day when the "dip" was clearly visible; there was no evidence that the driveway was negligently constructed or maintained; no evidence of any hidden defect either in construction or maintenance; in fact no evidence that the driveway was constructed or maintained in any manner other than many thousands of such driveways used throughout the City. The plaintiff was an elderly woman presumably in possession of all her faculties and one who was fully aware of the common practice of the use of such driveways.

Section 4½ of Art. 6 of the Constitution provides that: "No judgment shall be set aside * * * on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court * * *" shall find a miscarriage of justice. There can be no miscarriage because of erroneous instructions when there is no case made for judicial relief.

114 Cal.App.2d 674

In re DIAZ'S ESTATE.

MASON v. DIAZ et al.

Civ. 19020.

District Court of Appeal, Second District,
Division 1, California.
Dec. 12, 1952.

Proceeding in the matter of the estate of deceased testatrix. The Superior Court of Los Angeles County, Newcomb Condee, J., entered order confirming sale of realty belonging to estate of testatrix, and guardian of estate of minor appealed. The District Court of Appeal, Patrosso, J., pro tem., held that where testatrix by will directed that all of her children were obligated to pay for her funeral expenses, medicines, and doctor, and stated that all of her bills were paid and that she owed nothing to anyone, clear intention of testatrix was evinced not only to place all of her children on a parity, in so far as payment of any of her debts were concerned, but idea that disposition made by will in favor of anyone of the children was to be exempted from liability for debts was negatived.

Decree modified and, as modified, affirmed.

Wills ⚷830

Where testatrix by will directed that all of her children were obligated to pay for her funeral expenses, medicines, and doctor, and stated that all of her bills were paid and that she owed nothing to anyone, clear intention of testatrix was evinced not only to place all of her children on a parity, in so far as payment of any of her debts were concerned, but idea that disposition made by will in favor of any one of the children was to be exempted from liability for debts was negatived.

◆

Nathan Kates, San Fernando, and Gerald B. Tannen, San Fernando, for appellants.

Ardy V. Barton, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by Daniel J. Diaz, individually and as guardian of the estate of Arturo S. Diaz, a minor, from an order confirming the sale of a parcel of real property belonging to the above-named estate.

The hearing upon the petition for confirmation and the objections thereto filed by the appellant was conducted in a most informal manner. The only witness produced upon the hearing was the respondent administratrix who testified briefly as to the location of the property in question and that the house located thereon was "quite run down". The balance of the hearing consisted of a discussion between the court and counsel as to the proper interpretation of decedent's will, in the course of which various statements of fact were made which were by all parties seemingly treated as evidence. As a result the record before us is both meagre and unsatisfactory, but, as indicated by their briefs here, counsel are in agreement with respect to the following facts:

The decedent, a widow, died on February 26, 1946, leaving six children of which Arturo S. Diaz was the only minor. Aside from a small amount of cash and personal property of little value, admittedly insufficient to pay debts and expenses of administration, the estate consists of the parcel of real property the sale of which was confirmed by the decree appealed from. The property contains approximately 2-¼ acres, having a street frontage of 194 feet and a depth of 530 feet, and is improved by a dwelling house 20 x 40 which is located in the middle of the parcel. The entire parcel is subject to a lien of approximately $900.00 in favor of the County of Los Angeles for medical aid furnished to the decedent and members of her family at the Los Angeles County General Hospital. The nature and extent of the other indebtedness of which counsel make mention does not appear although there is a recital in the trial court's findings that the amount thereof is "in excess of $1,400.00 as settled in the decree of this court on April 9, 1951." This decree is not before us and there is no evidence in the reporter's transcript with respect thereto, but inasmuch as no objection is made to this finding by the appellant, and as it is conceded that the assets of the estate aside from the real property in question are insufficient to pay the debts and expenses of administration, we do not regard the matter as of particular consequence.

The will of the decedent comprises a series of eight documents in the Spanish language, each written, dated and signed in the handwriting of the decedent and bearing the various dates of December 13, 14, and 15, 1945. Copies of the originals, as well as the English translations thereof, are included in the clerk's transcript, and those with which we are primarily concerned are as follows:

> "December 13, 1945
>
> "Testament in favor of my sons Daniel and Arturo Diaz y Sumaza. Daniel shall be responsible for his minor brother, who is eight years of age, until he becomes twenty-one years old. For the benefit of both I bequeath the house and the furnishings, also fifty square feet of land around the house."
>
> "December 14, 1945
>
> "Testament. In favor of Arturo Diaz. The house and the furnishings and fifty square feet. The brother who will take charge of him will have the right to live in the house and otherwise whatever rental the house may bring shall be applied to pay his expenses and if his brothers should not treat him well they shall be disqualified and another person shall be appointed to care for him and to educate him. The front room shall be Arturo's bedroom as long as he is in this house."

In another of the documents, dated December 15, 1945, which need not be set forth at length, we find the following: "All my debts are paid. I owe nothing to anyone. * * * All my children are obligated to pay for the funeral expenses, medicines and the doctor."

The remaining documents comprising the will purport to dispose of real property described as "two lots on the south side which joins Elm Street to Baca Street, 50 feet wide by 190 feet long"; "one lot of 50 by 190"; "three lots"; "two lots 50 feet wide by 90 feet long"; and "one lot." Inasmuch as it is undisputed that decedent owned no other real property, these various lots seemingly were to be carved out of the parcel of real property in question, although we are advised by counsel that there are no streets named Elm or Baca in the immediate vicinity, and the property has frontage only upon one street, the name of which does not appear.

Appellant's objections to the sale in the trial court as well as here are predicated upon the contention that the language of the will quoted above constitutes a valid specific devise to the minor Arturo of the house and some portion of the real property upon which it is situated, and (so it is said) as there are no valid specific devises of the remaining portion, of the property, such remaining portion under the provisions of Probate Code, section 750, should be resorted to for the payment of debts and expenses of administration before a sale of the portion devised to Arturo could be validly decreed. Counsel for respondent, upon the other hand, contends that the words, "50 square feet" as applied to the area of land attempted to be devised with the house are so indefinite as to render the entire devise to Arturo invalid, and hence that the trial court properly decreed the sale of the entire parcel.

The trial court by the decree confirming the sale did not attempt to adjudicate the validity or the extent of the devise to Arturo although in its findings of fact and conclusions of law it purported to find as untrue the allegation contained in the objections of the appellant to the effect that the will did "specifically bequeath to the petitioner (appellant) the house situated upon said real property together with that portion of said real property upon which the house is situated." While this finding or conclusion is assailed as unsupported by the evidence, we find it unnecessary to consider the question as to the validity or extent of the devise to Arturo for, if the contention of appellant as to the validity of the devise be conceded, the order appealed from is otherwise adequately supported.

Probate Code, section 750, upon which appellant relies, reads as follows:

> "If the testator makes provision by his will, or designates the estate to be

> appropriated, for the payment of his debts, the expenses of administration, or family allowance, they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. If insufficient, that portion of the estate not disposed of by the will, if any, must be appropriated for that purpose; and if that is not sufficient, the property given to residuary legatees and devisees, and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."

The first sentence of this section is a re-enactment in substantially the same form as former section 1560 of the Code of Civil Procedure, while the second is based upon former sections 1562 and 1563 of the same code. The construction which has been accorded to this section and its predecessors is that the provisions thereof are without application where the testator by his will has made provision for the payment of his debts or has designated the estate to be appropriated therefor. In re Estate of Traver, 145 Cal. 508, 510, 78 P. 1058; In re Estate of Stevens, 27 Cal.2d 108, 120, 162 P.2d 918. Here, as noted above, the testatrix by her will directed that "all my children are obligated to pay for the funeral expenses, medicines and the doctor." When considered in the light of the preceding statements that "all of my bills are paid" and "I owe nothing to anyone," this language to us evinces a clear intention upon her part not only to place all of her children upon a parity in so far as the payment of her debts are concerned, but likewise negatives the idea that the disposition made in favor of any one of them was to be exempted from liability therefor. We are not unmindful of the fact that the direction to the children for the payment of her obligations makes mention only of the funeral expenses and the medical and doctor's bills and is silent as to other debts and expenses of administration, but we believe it fairly evident that in so stating she assumed that there would be no obligations to be discharged by her estate other than those specifically mentioned. Considering this provision of the will in its entirety, it is fairly inferable therefrom that she intended to impose upon each of her children the obligation of paying or discharging all of her debts whatever they might be. Were it otherwise, however, the principal indebtedness of the estate is the lien in the sum of $900.00 representing hospital and medical aid rendered to the decedent and members of her family by the Los Angeles County General Hospital, and it would appear reasonably clear that this item of indebtedness at least is comprehended by the language of the will imposing upon all her children the obligation of paying for "medicines and the doctor." Hence the Probate Code section cited is inapplicable, and as admittedly there is insufficient personal property to discharge this obligation and the only property available therefor is the real estate in question, it follows that the trial court's action in confirming the sale was proper.

We have heretofore adverted to the fact that the decree appealed from does not purport to adjudicate the validity or extent of the devise to Arturo, and an examination of the reporter's transcript indicates that it was not the intention of the trial judge to do so. After having orally announced his decision to confirm the sale the trial judge, in answer to an inquiry by the clerk as to the disposition to be made of a pending petition for the interpretation of the will which was on the calendar for hearing at the same time, stated: "That will go off calendar. I can't rule on that. I imagine when you get it worked around that the boy (Arturo) will get most of this money (proceeds of the sale)." Thus it would appear that the court entertained the view that, despite the sale of the property, all questions with respect to the construction of the will, including the validity and extent of the devise to Arturo, were to be reserved for determination until final distribution, at which time, pursuant to section 753 of the Probate Code, it would also be called upon to decide what contribution should be made by the other beneficiaries in the event the court should then decide that the devise to Arturo was valid. Any prior determination of this question would be premature. In re Estate of Reinhertz, 82 Cal.App.2d 156, 159, 185 P.2d 858, 186 P.2d 755; In re Estate of Stevens, supra, 27 Cal.2d 108, 120, 162 P.2d 918. It is evident also that this was and is the understanding of counsel for the respondent for in his brief he expressly concedes that the order confirming the sale does not operate to prejudice the rights of Arturo in this respect, and that his rights, whatever they may be, extend to the proceeds of the sale to the same extent as they existed with respect to the realty.

Notwithstanding the foregoing, we can well appreciate the apprehension of counsel for appellant in view of the trial court's finding already adverted to which, in effect, declares that the will does not operate to devise to Arturo the house and a portion of the property in question. In order to avoid the possibility of the claim being advanced at some future date that this finding constitutes an adjudication of the invalidity of the devise to Arturo, the trial court is instructed to reframe its findings of fact and conclusions of law so as to expressly declare that no adjudication is made as to the validity or extent thereof, and that all questions with respect thereto are reserved for later determination in an appropriate proceeding.

While, for the reasons stated, we have refrained from undertaking to determine the validity or extent of the purported devise to Arturo, we offer the observation that the devise of the house would seemingly carry with it at least so much of the land as it actually covers irrespective of any uncertainty in the language of the will as to a greater area City of Crawfordsville v. Botts, 76 Ind. 32, 34; McMillan v. Solomon, 42 Ala. 356, 358. We also suggest for the consideration of the trial court in any subsequent proceeding the desirability of inquiry as to whether the present translation of the decedent's will correctly reflects the meaning of the original Spanish text, namely whether a more accurate translation of the portion thereof undertaking to devise some part of the real property to Arturo is "a piece of land 50 feet square" rather than one having an area of 50 square feet.

As modified in the particulars herein before mentioned, the decree is affirmed, appellant to recover costs of appeal from the estate, payable in due course of administration.

WHITE, P. J., and DRAPEAU, J., concur.

114 Cal.App.2d 747

In re ELLIOT'S ESTATE.

Civ. 18975.

District Court of Appeal, Second District,
Division 2, California.
Dec. 15, 1952.

Will contest wherein the Superior Court, Los Angeles County, Arnold Praeger, J., granted a new trial on ground of insufficiency of evidence to sustain the jury's findings that decedent was of unsound mind and operating under undue influence at the time she executed the will, and the contestant appealed. The District Court of Appeal, McComb, J., held that there was evidence that would have legally substantiated and upheld a verdict for the proponents if the jury had decided for them, and that therefore a new trial had properly been granted.

Affirmed.

1. New Trial ⚷70

In passing on motion for new trial made on ground of insufficiency of evidence to sustain verdict, trial judge functions as a thirteenth juror and it is his duty to review all evidence, weigh its sufficiency and judge credibility of witnesses, and he is at liberty to disregard findings of jury which are implied from verdict.

2. Appeal and Error ⚷979(2)

In passing upon propriety of order granting new trial on ground of insufficiency of evidence, test is whether or not there is any evidence that would legally substantiate and uphold verdict for moving party had jury decided for him, and measured by such test only question for appellate court to decide is whether trial court abused its discretionary powers.

3. Wills 🔑50

Testamentary capacity exists if at time of execution of will testatrix is possessed of sufficient mental capacity to understand her act, to understand and recall the nature and situation of her property, and to remember and understand her relations to persons who have claims upon her bounty and whose interests are affected by provisions of instrument.

4. Wills 🔑337

Evidence would have sustained finding that testatrix was of sound and disposing mind and not acting under fraud or undue influence at time she executed her will, and, therefore, it was not error to grant a new trial after jury returned verdict for contestant predicated upon findings to the contrary.

Lee Combs, Los Angeles, for appellant.

Watkins & Charlton, Los Angeles, for respondent Jennings.

Albert E. Wheatcroft, Los Angeles, for respondent Fournier.

McCOMB, Justice.

This is an appeal by a contestant (hereinafter referred to as appellant) from an order granting a new trial on the grounds of insufficiency of the evidence after a jury returned a verdict in favor of appellant setting aside a will of Idell Elliot, deceased, on the grounds of (1) unsoundness of mind of the testatrix and (2) that decedent was motivated by undue influence at the time she executed the will.

Facts: Viewing the evidence in the light most favorable to respondents (proponents of the will) and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424, the record discloses that decedent was between 90 and 95 years of age; on January 14, 1946, she executed a will naming appellant as her principal beneficiary; later, on August 14, 1950, she executed another will revoking her previous will and naming respondents as the principal beneficiaries of her bounty.

Question: *Did the trial court commit prejudicial error in granting a motion for a new trial on the ground of the insufficiency of the evidence to sustain the jury's findings that decedent was (1) of unsound mind and (2) operating under undue influence at the time she executed the will of August 14, 1950?*

No. The following rules are pertinent:

[1] (1) In passing on a motion for a new trial made on the ground of the insufficiency of the evidence to sustain the verdict, it is the duty of the trial judge to review all the evidence, weigh its sufficiency and judge the credibility of the witnesses. He is at liberty to disregard the findings of the jury which are implied from the verdict. He functions as a thirteenth juror. (Fisher v. Zimmerman, 23 Cal.App.2d 696, 700[2], 73 P.2d 1243; In re Estate of Phillipi, 76 Cal.App.2d 100, 103[3], 172 P.2d 377; Broderick v. Sutherland, 94 Cal. App.2d 694, 696[3], 211 P.2d 364. Cf. 4 Cal.Jur.2d (1952) Appeal and Error, sec. 598, page 476.)

[2] (2) In passing upon the propriety of an order granting a new trial on the ground of the insufficiency of the evidence, the test is whether or not there is any evidence that would legally substantiate and uphold the verdict for the moving party had the jury decided for him. Measured by this test the only question for an appellate court to decide is whether the trial court abused its discretionary powers. (Van Antwerp v. Smith, 39 Cal.App.2d 458, 459 [1] et seq., 103 P.2d 446).

[3] (3) Testamentary capacity exists if at the time of the execution of a will the testatrix is possessed of sufficient mental capacity to understand her act, to understand and recall the nature and situation of her property, and to remember and understand her relations to persons who have claims upon her bounty and whose

interests are affected by the provisions of the instrument. (In re Estate of Russell, 80 Cal.App.2d 711, 719 [6], 182 P.2d 318.)

In the present case the evidence discloses that testatrix executed the will in question in the presence of her attorney and his office secretary, both of whom testified that decedent when she executed the will was, in their opinion, (a) of sound and disposing mind and (b) not acting under fraud or undue influence of any person or persons.

[4] Therefore applying the above stated rules, there is no question there was substantial evidence to have sustained a finding that testatrix was of sound and disposing mind and not acting under fraud or undue influence at the time she executed her will.

Other testimony introduced by appellant which might support a contrary conclusion must be disregarded by this court under rule (2), supra. No useful purpose would be served by setting out conflicting and contrary testimony.

Affirmed.

MOORE, P. J., and FOX, J., concur.

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114 Cal.App.2d 623

GROOVER v. BELMONT.

Civ. 4472.

District Court of Appeal, Fourth District, California.

Dec. 10, 1952.

Grower's action against fruit packer, wherein the defendant filed a cross-complaint. The Superior Court, Orange County, Robert Gardner, J., reformed the contract between the parties in accordance with intentions of the plaintiff, and awarded defendant judgment for only $179.50, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained the reformation judgment.

Affirmed.

1. Evidence 🔑450(8)

Where contract between grower and packer contained printed provision that packer should pay grower only what was left after deducting numerous charges and after eliminating any fruit which the packer might prefer to consider as unmerchantable, but there was written in longhand a provision guaranteeing 35¢ per field box to grower for fruit taken, there was such ambiguity and inconsistency in contract as would render oral evidence admissible in action involving such agreement.

2. Pleading 🔑237(8)

Amendment to conform pleadings to proof by setting up clear cut action for reformation of contract was properly allowed where mistake, misrepresentation and fraud were alleged in grower's declaratory judgment action against fruit packer and validity and nature of agreement was fact in dispute. Code Civ.Proc. §§ 469, 470.

3. Reformation of Instruments 🔑45(2)

In grower's action against fruit packer, evidence sustained judgment reforming contract between parties because of mistake on the part of plaintiff, known to defendant, and because of misrepresentations by defendant upon which plaintiff relied in signing the contract.

G. V. Weikert, Los Angeles, S. B. Kaufman, Anaheim, for appellant.

Utt & Hubbard and Delbert L. Larsh, Santa Ana, for respondent.

BARNARD, Presiding Justice.

This case involves an orange crop agreement. The plaintiff, an elderly woman, had for many years marketed her fruit through a consignment contract with the American Fruit Company. Because of frost damage this company advised her to sell her 1949 crop for cash instead of marketing it in the usual manner. She contacted the Granada Packing House, operated by the defendant, and was told that they were buying for cash. They sent their buyer, one Ogilvie, who made an agreement with her. She signed a printed form of consignment contract providing, in part, that it was to continue in effect until terminated in the manner provided; that it covered merchantable fruit only, the defendant to be the sole judge of merchantability; and that the grower was to be paid the net proceeds after deducting $1.40 per packed box for packing services, all picking, hauling, shipping and other charges, and any advances made. It contained a further provision, written in by Ogilvie in longhand, that the defendant "guarantees 35¢ per field box" for all fruit received and accepted.

On July 25, 1949, the day after picking was completed, the defendant gave the plaintiff a check for $2500 marked "accommodation advance". On November 21, 1949, the plaintiff sent the defendant a written notice that she was withdrawing from the contract as of that date. On December 28, 1949, the defendant sent the plaintiff an "accounting" setting forth that 6630 field boxes had been received; that 67 boxes were unmerchantable; that the net field boxes was 6563; that the net returns from sales of 6380 boxes and some "bags" was $2894.15; that the deductions for picking and hauling and "frost separation" was $2643.35; that the net returns were $250.80; that there was due the defendant $2249.20; and that "your return exceeds your guarantee." About a month later, another "accounting" was sent showing exactly the same figures except that it listed 5667 field boxes as unmerchantable and the net field boxes as 963, and stating that an error had been discovered "concerning unmerchantable fruit". On March 10, 1950, the defendant wrote to plaintiff admitting receipt of the withdrawal notice and stating that because there was a balance due him he "deemed" the contract still in force. On March 22, 1950, the plaintiff's attorney sent the defendant a check for $179.50, the amount paid in excess of the guarantee, and stating that the $2500 was a payment for fruit and not an advance, and that she would resist any attempt to market her fruit during 1950. On March 23, the defendant returned the check, stating it was not the correct amount, and insisting that this was a consignment contract and not one of purchase.

In this action which followed the complaint alleged, in addition to the factual background, that the defendant had agreed to buy this crop at a guaranteed price of 35¢ per field box, with a representation that more than the guaranteed price might be received; that Ogilvie had falsely represented to plaintiff that it was necessary that she sign this "form contract", that it was used in all such sales, and that it did not contain any provisions inconsistent with the outright sale of the fruit at a guaranteed price of 35¢ per field box; that he thereupon wrote the words of the guarantee in the form-contract; that plaintiff signed the contract in reliance on these representations, which were false and knowingly made; that she was given $2500 in payment for the fruit, with the explanation that an even figure was used since she could expect more than the guaranteed price; that on November 1, 1949, she first learned that this form contract purported to be a marketing agreement, instead of an outright sale, and then gave written notice of withdrawal; and that on March 10, 1950, she first learned that the defendant contended that she was indebted to him and that her withdrawal was ineffective. It was then alleged that an actual controversy exists in that she contends that her signature was obtained by fraud, that the only contract was one of sale and not one of consignment; that the written part of the contract is inconsistent with the printed portion, and that the $2500 was not a mere advance; while the defendant contends that this is a consignment contract, that the $2500 was merely an advance, and that there is a balance due him of $2301.95. The prayer was for declaratory relief; for an accounting; that the court declare the contract be one of sale and not one of consignment; and for other equitable relief. The defendant, by answer and cross-complaint, admitted the agency of Ogilvie; alleged that this was a consignment contract; and sought to recover $2361.03 for money advanced, with an additional $2800 as liquidated damages for failure to permit him to handle the 1950 crop.

At the conclusion of the trial the court expressed doubt as to whether the proper relief could be granted under the pleadings, and ordered the plaintiff to amend her answer to the cross-complaint, in order to conform to the proof, by setting up a clear-cut action for reformation of the contract. This was done with appropriate allegations of mistake, fraudulent representations, and fraudulent concealment. The court then made full and complete findings in favor of the plaintiff finding, among other things, that the defendant had agreed to purchase this crop at a guaranteed minimum price of 35¢ per field box for each and every box picked; that this agreement applied only to the 1949 crop; that as a result of plaintiff's mistake, known to the defendant, and of the misrepresentations of the defendant, the written contract did not embody the actual agreement but was wholly inconsistent therewith; that the representations made were false; that the plaintiff had signed the contract relying on representations that it contained nothing inconsistent with the guaranteed minimum price; that the $2500 exceeded the guarantee but was not a loan or an advance; and that the plaintiff is not indebted to the defendant in the sum of $2361.03, or any other sum except $179.50. Judgment was entered reforming the contract so as to provide that the defendant agrees to purchase this 1949 crop at a guaranteed minimum price of 35¢ per field box for each and every box picked, and providing that this agreement is not a marketing or consignment contract; that the agreement as so reformed applied only to the 1949 crop; and that the defendant have judgment against the plaintiff for $179.50. The defendant has appealed from that judgment.

It is first contended that the court erred in ordering or permitting the amendment to conform to proof. It is argued that the action, being for declaratory relief, involved only an interpretation of the written contract; that since there was no ambiguity, inconsistency or uncertainty in that contract parol evidence was not admissible; and that the oral evidence erroneously received not only varied the terms of the written contract but gave them a completely opposite effect. Relying on Sections 469 and 470 of the Code of Civil Procedure and several cases, it is argued that an amendment to conform to proof cannot be allowed when it has the effect of substantially changing the cause of action.

[1, 2] The oral evidence was properly admitted here. The written contract was ambiguous in many respects and there was an obvious inconsistency between the provisions contained in the fine print and the provision written in longhand. The latter guaranteed 35¢ per field box to the grower for the fruit taken, while the former provided that the packer should pay the grower only what was left after deducting numerous charges, and after eliminating any fruit which the packer might prefer to consider as unmerchantable. Moreover, mistake, misrepresentation and fraud were alleged and the validity and nature of the agreement was the fact in dispute. Sec. 1856, Code Civ.Proc.; DeOlazabal v. Mix, 24 Cal.App.2d 258, 74 P.2d 787. The amendment to conform to proof did not introduce a new and independent cause of action but was based upon the same transaction and the same contentions, and was merely directed to a different form of relief. Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038; Big Boy Drilling Corporation v. Rankin, 213 Cal. 646, 3 P.2d 13. The amendment here permitted, whether necessary or not, was properly allowed under the facts established at the trial in order to do justice and to avoid further useless litigation. Carman v. Athearn, 77 Cal.App.2d 585, 175 P.2d 926.

[3] It is next contended that the amendment did not conform to the proof since it appears that the respondent understood the effect of this consignment contract and was in no way deceived by any statement made to her; and that the findings on which reformation was based are not supported by the evidence since there was no finding of fraud on the part of the appellant or his agent, and the evidence negatives the possibility that Ogilvie could have known of or suspected any mistake on the respondent's part.

The evidence and record do not support these contentions, and fraud was both alleged and found. There is little conflict in the evidence as to the controlling facts which, so far as the written contract is concerned, are similar to those in the case of Jackson v. Belmont, 108 Cal.App.2d 288, 238 P.2d 1084, where this same appellant made like contentions.

The respondent testified that her regular shipping company advised her to sell that year's crop for cash; that in response to her inquiry the appellant said they were buying for cash and sent Ogilvie out; that Ogilvie offered her 25¢ a box or 50% of what the fruit brought, which she refused; that he came back later and said they would take the crop with a guarantee of 35¢ a field box for all oranges picked, and that she might get a little more if the market held up; that when she objected to signing the contract he presented he told her that he did not have a form of cash contract with him and that they had to have some kind of contract for "prorate" purposes; that he wrote in the provision guaranteeing 35¢ a field box and told her that she could disregard the rest of the matters stated in the form, that if she signed the contract it would guarantee her 35¢ a field box and she might get a little more, and that she could follow the last load in and get her money; that she never asked for any advance; that immediately after the fruit was delivered she was given a check for $2500; and that when she noticed the words "accommodation advance" on the check they told her the reason therefor was that the fruit might bring more than the guarantee.

Her testimony is fully supported by Ogilvie's testimony although a part thereof was equivocal in a marked degree. He testified that at their first conversation respondent insisted that she must have not less than 35¢ a field box for the fruit as it stood on the trees; that having inspected the fruit he thought this was too much and told her he would submit the matter to the appellant; that the appellant went with him to inspect the fruit and told him there was more good fruit there "than I thought there was"; that the appellant instructed him to conclude a deal "on the basis of 35¢ a field box"; that he then told the respondent that the appellant would take the fruit and guarantee 35¢ for every box that came off the trees; that he presented the contract, to which the respondent objected; that he explained a part of it and left it with her; that the contract was later signed; and that when he delivered the check he explained to the respondent that the appellant had made a check for an even $2500, and that this might be a little more or a little less than their guarantee would come to. On cross-examination, he testified that before the contract was signed he told the respondent that the contract only covered merchantable fruit, and that "that was the reason the guarantee was as low as it was." This explanation is strange in view of the admitted fact that the appellant was then paying $2.50 a hundred for undamaged oranges. Moreover, on redirect examination Ogilvie testified that he had told the respondent that while the contract covered merchantable fruit only "the guarantee which was in the contract was based on the average amount of merchantable fruit"; that she would get "35¢ for every field box taken out of the grove"; and that she could get her money as soon as the fruit was picked.

The evidence supports the findings, which in turn support the judgment. As the trial judge remarked, it seems unbelievable that the respondent would leave the company with which she had dealt for years, in order to avoid a consignment deal, and then enter into a consignment agreement with the appellant. Under his interpretation of the contract, the appellant finally decided that the part of the fruit which he had actually sold for $2200 was unmerchantable, and he also charged the respondent with expenses which exceeded the minimum amount he had agreed to pay.

It is next contended that the judge reformed the contract improperly in any event. It is argued that instead of merely reforming some clause or sentence the court wrote an entirely new contract for the parties. This contention is without merit. The court determined the real agreement made by the parties and reformed the written contract to express that agreement.

The appellant's final contention is that he was entitled to judgment on his cross-complaint for $2361.03, for money advanced and on a book account and, under another cause of action, for $2800 as liquidated damages for the failure to deliver the 1950 crop from this grove. This is based on the assumed validity and effect of the contract as written, and on the contention that the court was without power to ascertain or enforce the real intention of the parties. The court having properly reformed this contract, Stafford v. California Canning Peach Growers, 11 Cal.2d 212, 78 P.2d 1150, no foundation for this claim remains.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

114 Cal.App.2d 655

PRESCOTT v. RALPHS GROCERY CO.

Civ. 19377.

District Court of Appeal, Second District,
Division 1, California.
Dec. 11, 1952.

Action in which the Superior Court, County of Los Angeles, Otto J. Emme, J., entered judgment for defendant, and plaintiff appealed. The defendant made application for correction of reporter's transcript. The District Court of Appeal held that where defendant made application to District Court of Appeal for correction of claimed omission in instruction set forth in reporter's transcript on appeal, and plaintiff by affidavit alleged that Superior Court had given instruction as it appeared in record, and correctness of transcript was certified by County Clerk only, no request correction of transcript for correction having been filed within time allowed by Rules on Appeal, application for correction and affidavit filed in connection therewith would be referred to Superior Court with directions to certify a true copy of instruction as given.

Judgment accordingly.

Appeal and Error 🔑657(1)

Where defendant made application for correction of claimed omission in instruction set forth in reporter's transcript on appeal, plaintiff by affidavit alleged that Superior Court had given instruction as it appeared in record, and correctness of instruction was certified by County Clerk only, no request for correction having been filed within time allowed by Rules on Appeal, application for correction and affidavit filed in connection therewith would be referred to Superior Court with directions to certify a true copy of instruction as given. Rules on Appeal, rules 8(a), 12.

◆

Kenny & Morris, Eleanor V. Jackson, Los Angeles, for appellant.

Moss, Lyon & Dunn, Richard B. Coyle, Los Angeles, for respondent.

PER CURIAM.

Pursuant to Rule 12 of Rules on Appeal, respondent makes application for correction of a claimed omission in the reporter's transcript on appeal.

In the affidavit supporting the application respondent's counsel avers that he did not check the instructions as reported in the reporter's transcript "word by word" until appellant in her opening brief claimed error in an instruction as set forth in the reporter's transcript.

Respondent presents to us a certified copy of B.A.J.I. Instruction No. 149 on file in the records of this cause in the office of the clerk of the superior court, and which reads as follows:

> "Conduct which is in violation of Sec. 56-08(e) Los Angeles Municipal Code just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that *he* (*or*) (she) was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in quetion was ex-

> cusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."

Respondent asserts that the reporter's transcript erroneously records said instruction by failing to include the words "he (or)" immediately preceding the word "she" in the second sentence of the aforesaid instruction, and which words we have italicized. That the aforesaid B.A.J.I. instruction was given by the trial court as above set forth. That because of appellant's claim of error in the omission of the words "he (or)" it is important that the reporter's transcript be corrected to show that the said words were included in the instruction as given.

In the affidavit filed in opposition to the application, one of appellant's counsel avers that "upon the presentation of the reporter's transcript affiant carefully went over the instructions in the said transcript because affiant of her own knowledge had remembered or believed that she remembered that certain of the instructions were misread, and accordingly consulted with reporter, Eva S. Jordan, on said subject prior to approving the reporter's transcript. Affiant specifically noticed in said transcript the fact that the court had misread an instruction given on its own motion which appeared in the reporter's transcript at page 112, lines 21–26, and page 113, lines 1–9.

> "Affiant is further of the opinion that the court did in fact read the instruction as it presently appears in the reporter's transcript and so alleges."

Appellant's counsel in her affidavit further avers that following the filing of the aforesaid application by respondent, she, said counsel, again spoke with the aforesaid reporter, and that the latter reread to counsel her notes, and stated that with regard to such instruction her notes read as follows:

> "Conduct which is in violation of Section 26.08(c) of the Los Angeles Municipal Code just read to you constitutes negligence per se. This means that if the evidence supports a finding and you do find, that a person did so conduct himself, it requires his (sic) presumption that he was negligent."

From the foregoing, this court is now confronted with three different versions of the aforesaid B.A.J.I. Instruction No. 149. It is manifest that we are in no position to determine in what language the instruction was framed when actually given by the trial court.

In her opening brief on appeal appellant asserts that the instruction which was given by the court on its own motion as to the applicability of the provisions of the Los Angeles Municipal Code "implied that its terms required a presumption that the plaintiff-appellant was negligent. This implication is made because appellant was the only person the court could have meant when it referred to 'she'."

It should be noted that nowhere in the record does it appear that the correctness of the instructions appearing in the reporter's transcript was certified to by the trial judge. No request for correction of the transcript on appeal having been filed within the time allowed therefor, the County Clerk of Los Angeles County, pursuant to Rule 8(a) of Rules on Appeal, certified to the correctness of said reporter's transcript.

Therefore, said application, together with the opposition thereto and all affidavits filed in connection therewith, is hereby referred to Hon. Otto J. Emme, Judge of the Superior Court of the State of California in and for the County of Los Angeles, who presided at the trial, with directions to certify to this court a true copy of the instruction as actually given by him to the jury at the trial of this cause.

114 Cal.App.2d 491

DENNY et al. v. WATSON et al.

Civ. 18990.

District Court of Appeal, Second District,
Division 1, California.
Dec. 2, 1952.

Hearing Denied Jan. 22, 1953.

Petition for writ of mandate directing Real Estate Commissioner to restore petitioners' licenses as real estate brokers. The Superior Court, Los Angeles County, Frank G. Swain, J., denied the petition, and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that statute which provides that whenever a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation or deceit, Real Estate Commissioner may, after hearing, suspend or revoke license at any time within three years is valid, and does not deprive real estate brokers who have appeared in defendants' civil action charging fraud, who have been represented by counsel, who have had judgment taken against them and whose licenses have been revoked after hearing by Commissioner of due process of law.

Affirmed.

Doran, J., dissented.

1. Criminal Law 🔑562
Evidence 🔑597

The weight of the evidence which will warrant a conviction in a criminal case is materially different from that which will support a judgment in a civil case.

2. Brokers 🔑3

Under statute which provides that whenever a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation, or deceit, the real estate commissioner may, after hearing, suspend or revoke the license at any time within three years, the Commissioner is not required to suspend or revoke the license, but the licensee may appear and defend, and judgment for fraud in a civil case is only prima facie evidence upon which Commissioner may, in his discretion, continue, suspend, or revoke the license. Business and Professions Code, §§ 10176(i), 10177(f), 10177.5.

3. Constitutional Law 🔑48

In passing upon the constitutionality of any law, the District Court of Appeal is bound by rigid rules, and it must give force and effect to the questioned statute unless it appears clearly unconstitutional.

4. Constitutional Law 🔑48

All presumptions and intendments are in favor of the constitutionality of a statute, and all doubts are resolved in favor of its validity and not against it.

5. Constitutional Law 🔑48

The existence of facts supporting the legislative judgment is to be presumed, and the burden of overcoming the presumption of constitutionality is cast upon the assailant.

6. Brokers 🔑1
Constitutional Law 🔑287

Statute which provides that whenever a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation, or deceit the real estate commissioner may, after hearing, suspend or revoke license at any time within three years is valid and does not deprive real estate brokers of due process of law when brokers who were defendants in civil action charging fraud had been represented by counsel, and had had a hearing before the revocation of their licenses by the Commissioner. Business and Professions Code, §§ 10176(i), 10177(f), 10177.5.

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Morris Lavine, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondents.

DRAPEAU, Justice.

Plaintiffs petitioned the Superior Court for a writ of mandate, directing the Real Estate Commissioner of this state to restore to them their licenses as real estate brokers. On the Commissioner's hearing counsel for the Commissioner introduced in evidence findings of fact and judgment in a civil action for fraud against petitioners in the Superior Court, and rested.

The facts so found were that petitioners were doing business together as real estate brokers; that they secured a deed from one of their clients to a motel, on their representations that they would not record the deed until they had sold the property; that they would keep up payments on trust deeds, liens against the property, would manage it, and when they sold it would pay their clients $5,500 clear of the debts.

Instead of doing as they had agreed to do, petitioners recorded the deed, failed to keep up the trust deed payments, permitted the property to be sold under power of sale in one of the trust deeds, and through a confederate purchased the property for themselves at the sale which followed.

Upon these facts the Superior Court rendered judgment against petitioners. This judgment they paid and satisfied in full.

Proceedings were commenced by the Real Estate Commissioner to revoke petitioners' licenses. After due notice, petitioners appeared at the Commissioner's hearing, without counsel. They were sworn, made their statements and were cross-examined, and participated in the hearing.

The Commissioner found that petitioners had violated sections 10177.5, 10176(i), and 10177(f) of our Business and Professions Code, and revoked their licenses.

The Superior Court refused to grant the writ of mandate, and petitioners appeal from that judgment.

Section 10177.5, Business and Professions Code provides:

> "Whenever a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation or deceit with reference to any transaction for which a license is required under this division, the commissioner may, after hearing in accordance with the provisions of this part relating to hearings, suspend or revoke the license of such real estate licensee at any time within three years subsequent to said judgment."

Petitioners challenge the constitutionality of that Code Section, and of sections 10176 (i) and 10177(f) of the same code, and assert that each and all of them violate due process of law guaranteed by our state and federal constitutions. Petitioners also challenge section 10177.5 upon the constitutional ground that it denies them equal protection of the laws, in that it singles out real estate brokers and does not extend to other professions and occupations.

Undoubtedly the Real Estate Commissioner was empowered to determine whether petitioners were guilty of acts involving dishonest dealings. Brecheen v. Riley, 187 Cal. 121, 200 P. 1042; Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425; de St. Germain v. Watson, 95 Cal.App.2d 862, 214 P.2d 99.

No cases directly involving the constitutionality of section 10177.5 have come to the attention of this court, it having been enacted in 1945.

Our California real estate act was first held to be constitutional in Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418.

Other sections of the act have been approved. Section 10177(b), in Payne v. Real Estate Commissioner, 93 Cal.App.2d 532, 209 P.2d 419.

In cases where business or professional licensees are convicted of felonies involving moral turpitude, the judgment of conviction compels revocation of licenses. Meyer v. Board of Medical Examiners, 34 Cal.2d 62, 206 P.2d 1085; Murrill v. State Board of Accountancy, 97 Cal.App.2d 709, 218 P.2d 569.

[1] It is pertinent here to say, however, that in this case we are dealing with the effect of a judgment in a civil, not a criminal case. Upon fundamental and familiar principles the weight of the evidence which will warrant a conviction in a criminal case is materially different from that which will support a judgment in a civil case. And in civil cases nine members of a jury determine controverted facts, as against all twelve in criminal cases.

[2] But the statute under consideration does not, *ipso facto* require suspension or revocation of a real estate broker's license. It makes a judgment for fraud in a civil case *prima facie* evidence, upon which the Real Estate Commissioner may suspend or revoke the license.

A hearing is required. Licensees under attack may appear and defend themselves. And the Commissioner in his discretion may continue, or suspend, or revoke licenses.

As the Attorney General argues, the section commends itself from a practical, common sense viewpoint. It saves duplication of proof,—first, the hearing in court, and then, the Commissioner's hearing.

In this case petitioners had their day in court. They were represented by counsel. The issue of their fraud was heard and determined in that tribunal. This court perceives no good reason why it would be a denial of due process of law to have the evidence in fraud actions against real estate brokers in the Superior Court taken all over again in Commissioner's hearings to revoke or suspend their licenses.

And in this case petitioners again had their day on the Commissioner's hearing. They told their stories. They could have been represented by counsel, but waived that right. Indeed, there is force in the Attorney General's argument that the record of the Commissioner's hearing contains sufficient admissions and testimony of petitioners themselves to support the Commissioner's order.

[3] In passing upon the constitutionality of any law, this court is bound by rigid rules.

It is the duty of this court to give force and effect to the questioned statute unless it appears clearly unconstitutional. Richfield Oil Co. v. County of Los Angeles, 100 Cal.App.2d 535, 224 P.2d 398.

[4] All presumptions and intendments are in favor of the constitutionality of a statute, and all doubts are resolved in favor of its validity not against it. Clark v. City of Pasadena, 102 Cal.App.2d 198, 227 P.2d 306.

[5, 6] The existence of facts supporting the legislative judgment is to be presumed, and the burden of overcoming the presumption of constitutionality is cast upon the assailant. Dribin v. Superior Court, 37 Cal.2d 345, 231 P.2d 809, 24 A.L.R.2d 864.

Applying these rules to the code sections questioned here, they must be held to be constitutional.

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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114 Cal.App.2d 473

HEPLE v. KLUGE et al.

Civ. 14867.

District Court of Appeal, First District,
Division 2, California.

Dec. 1, 1952.

Hearing Denied Jan. 22, 1953.

Action for money advanced and services rendered at defendants' special request in construction of a building for defendants, and defendants filed a cross-complaint. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., rendered a judgment in plaintiff's favor and against defendants on defendants' cross-complaint, and defendants appealed. The District Court of Appeal, Goodell, J., held that erroneous given instructions were harmless.

Judgment affirmed.

1. Contracts 🔑284(1½)

Generally a licensed architect does not have authority to unmake, change, modify, or alter contracts of his principal.

2. Trial 🔑194(11)

In action for money advanced and services rendered at defendants' request in construction by plaintiff of a building for defendants, instruction that if jury found defendants employed named architectural draftsman to prepare plans which draftsman guaranteed would pass building inspector, and if jury found plans were returned pursuant to defendants' directions for revision and were revised by such draftsman and delivered to plaintiff as being redrafted plans, such plans were defendants' plans and defendants were bound by act of such draftsman in revision as if defendants had authorized revision, did not violate constitutional provision that judges shall not charge juries with respect to matters of fact. Const. art. 6, § 19.

3. Appeal and Error ⚷1064(2)

Fact that instructions, given in action for money advanced and services rendered at defendants' special request in construction of a building for defendants, charged on facts in violation of constitution did not require reversal of judgment for plaintiff where facts as to which charge was made were uncontradicted. Const. art. 6, § 19.

4. Trial ⚷192

It is not error for instruction to assume existence of a fact which is undisputed.

5. Trial ⚷252(2)

A court must give instructions if there is any substantial evidence supporting theory of party tendering them.

6. Work and Labor ⚷30(3)

In action for money advanced and services rendered at defendants' special request in construction of building for defendants, instruction that in determining whether plaintiff substantially performed contract with defendants jury was to consider revised plans drawn by defendants' architect as being plans mentioned in contract between plaintiff and defendants, according to which plans plaintiff was required to construct building for defendants, and that jury was to reject original plans prepared for defendants by architectural draftsman employed by defendants, which plans did not pass building inspector, was proper under evidence.

7. Contracts ⚷313(2)

If defendants, who employed plaintiff to construct building for defendants, notified plaintiff that defendants would not accept plaintiff's performance unless plaintiff completed building in conformity with original plans prepared by defendants' architectural draftsman, which were revised so as to pass building inspector, such demand was unwarranted condition to defendants' offer to perform their part of construction contract, and if plaintiff had not violated contract plaintiff was entitled to regard such demand as a repudiation of contract by defendants and was justified in stopping further work on contract.

8. Contracts ⚷238(2)

Even though written specifications which were part of contract provided that there could be no modifications or changes in terms of contract except by agreement in writing, such specifications could be altered or modified by executed oral agreement, and if plaintiff and defendants orally agreed to change any terms of specifications, and if plaintiff fully performed terms of oral contract of modification, neither party could complain that such modification was not authorized or valid.

9. Trial ⚷194(7)

In action for money advanced and services rendered at defendants' special request in construction of a building for defendants, instruction telling jury that evidence was uncontradicted that plaintiff had expended a specified amount of money for labor, materials, equipment rental and contracting services was not a charge that as matter of law plaintiff's testimony relative to amount of money expended by plaintiff was to be accepted as true.

10. Evidence ⚷594

A jury, provided they do not act arbitrarily, may reject in toto testimony of a witness even though such testimony is uncontradicted.

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Herbert Chamberlin, San Francisco, for appellants.

James F. Boccardo and Jean M. Blum, San Jose, Edward J. Niland, Santa Clara, of counsel, for respondents.

GOODELL, Justice.

Plaintiff, a building contractor, sued for $19,354.38 for money advanced and services rendered at defendants' special instance and request, in the construction of a building in San Jose. Defendants pleaded that plaintiff had contracted to construct a building for $22,490 according to certain plans and specifications but had failed to do so. They also filed a cross-complaint for $30,000, of which $5,000 was claimed as damages for the demolition of the alleged unsuitable structure and $25,000 for other accrued and prospective damages. A verdict for $18,669.47 was returned in plaintiff's favor and against defendants on their cross-complaint. From the judgment entered thereon this appeal was taken after a new trial had been denied.

At the trial 17 witnesses were examined, and their testimony covers 730 pages.

The jury was instructed that the evidence was "uncontradicted that the plaintiff * * expended * * * $19,869.47 for labor, materials, equipment rental and contracting services." It was also instructed on the rule of substantial performance. The fact that the verdict was for a sum $1,200 less than the $19,869.47 figure would indicate that they followed the substantial performance instructions and deducted the $1,200 for deviations or variances.

Defendants, who are sisters, conducted a curtain laundry in leased premises in San Jose and decided to put up a building on a lot of their own on West San Carlos Street a short distance from their old location. Their purpose was to occupy half the ground floor for their business and rent the other half to tenants until such time as their business warranted their occupancy of the whole floor. The upper floor was to be apartments.

Plaintiff did not enter the picture until a year or so after defendants had started on their project.

Defendants first employed Kress & Gibson, San Jose architects, to design the building, but determined that its cost, according to the plans and specifications, was more than they could afford. They then employed Leonard Clover, an architectural draftsman, to prepare other plans. As he was not then licensed, he engaged Mark Thomas, a licensed engineer, to do the engineering part of the work. New plans were drawn by Clover and delivered to defendants by him, and in September, 1946, he and Thomas were paid in full for their services. Many months later defendants submitted these plans to plaintiff for bidding, and on June 26, 1947 he made defendants an offer reading as follows: "We propose to bid the sum of $22,490.00 for constructing your building * * * as per plans and specifications with the following items, eliminations and substitutions [detailing items not involved herein] * * *. The price quoted, $22,490.00 is a guaranteed cost. We are, however, willing to perform the work above specified on the guaranteed cost with the alternative of a cost plus setup. (Cost plus 5% overhead and 10% profit.) That is, if the cost plus is not in excess to [sic] our bid price, the owners shall accept the cost plus price." This was orally accepted by defendants on September 10, 1947.

On April 6, 1948 construction work on the building, then about 80% complete, was brought to a halt when defendants wrote plaintiff as follows: "In regard to your contract * * * please be advised that efforts are being made to arrive at a prompt determination of the responsibility for variances which have occurred in the construction as related to the original plans and specifications. We plan very shortly to arrive at some proposal to submit to you after consulting with the various parties who have worked over the plans and with the Building Inspector. In the meantime, please do not continue your building operations."

By that time upward of 20 controversies had arisen, the major one of which concerned the partition dividing the lower floor. Defendants wanted a partition which could be removed whenever the time arrived for them to make over the lower floor for their sole occupancy. However, a bearing wall was built instead of a temporary partition. Since this is the basis for the principal legal questions in this case, the evidence on that subject has to be set forth rather fully.

The evidence is without contradiction that when Clover assumed the job of making the plans, defendants discussed fully with him their reasons for requiring a temporary and removable partition. Thomas, who did the engineering work on the plans, was employed by Clover, not by defendants, and there is no evidence in the record that Clover or anybody else ever explained to him or to any of his associates or employees that the partition had to be removable, or gave him defendants' reasons for wanting it so. Furthermore, there is no evidence in the record that defendants ever told plaintiff anything about the removable partition or their reasons for it, or that Clover or anybody else did so.

Clover's original plans provided for an I-beam running lengthwise of the building, designed to support its upstairs part, which I-beam would, at the same time, permit of a partition beneath it and aligned with it.

Clover's contract with defendants was that he would produce plans which would meet all the requirements of the building laws. And while he was preparing the plans Clover told defendants that he was checking with the Building Inspector so that no changes would be necessary when a building permit was applied for, and that defendants would get workable plans which would pass the Building Inspector. Defendants testified that when they received the plans they understood they were getting such plans, and that that was what they paid Clover to produce. *They said they understood that if the plans did not pass, Clover would make whatever revisions were necessary to comply with his agreement.*

Plaintiff submitted the plans for approval shortly after his contract was made, but a building permit was refused.

Robert Lotz, superintendent of the Department of Building of the City of San Jose, a witness for the defendants, testified that he denied the permit "Because the structure, as shown on the plans, wouldn't comply with the city or state regulations.

> "Q. In what particular, as to the lateral bracing? A. Principally the lateral bracing; there were some other things, also.
>
> "Q. What were the other things, if you recall? A. *One was that beam that has been discussed so much;* I checked that since you were in my office a couple of weeks ago, and *that beam, as shown on the original plans, was too light to carry the required load.*
>
> "Q. You didn't order the beam out, though, did you? A. No, sir, *I may have ordered it changed to a heavier beam* * * *.
>
> "Q. You did not so order; in other words, principally your orders were to take care of the lateral bracing forces under the Riley Act, is that correct? A. That, *and the vertical loads,* we checked for * * * all things in connection with the fireproofing, exits, I mean a total check on the place.
>
> "Q. I see, but *the principal reason for denying the permit was that there was an over-stress on the beam, the I-beam, and in addition there were insufficient lateral bracings in the building,* is that correct? A. *That's correct.*" (Emphasis added.)

Defendants were informed by an employee of plaintiff that the permit had been refused because "something had to be done about * * * bracing the concrete wall" and the plans had to go back to the engineer. Theresa Kluge was told by Clover that "it was something to do with the bracing of the concrete wall, something about lateral forces, and something about a Riley Act that had been passed while Mr. Thomas was in the service" and that it was "merely some work that Mr. Thomas had to do" and had "nothing to do with his [Clover's] work at all." Both defendants testified that they did not expect revised plans to be drawn.

The witness Pardini, plaintiff's assistant, testified that he informed defendants that the permit had been denied and that the plans had to go back to Thomas so that something could be done about the lateral bracing of the concrete wall.

After some delay Theresa Kluge called Pardini to ask if the changes had been made, and he told her to inquire of Clover if the plans were ready. Clover then referred her to Thomas, who told her the plans had been sent back to Clover's office and would be returned to him and then submitted to the Building Inspector. Defendants testified that no set of revised plans were delivered to them by Clover and that they did not know of, or consent to, the elimination of the I-beam, but thought the changes concerned only lateral bracing.

Savio, the engineer associated with Thomas, who did the work on which the revised plans were based, testified that Thomas took the plans to the Building Inspector and then reported to Savio what had been said. Savio made the changes to increase the lateral forces and improve the structural design and was told by Thomas to inform Clover of them. Savio eliminated the I-beam because he thought it would improve the design to provide for a bearing wall and because the I-beam, in his opinion, had no use in the plan. He went over the changes with Clover, who re-drew the plans in accordance with Savio's sketches and returned them to Savio for further checking before they were used.

Clover testified that to comply with his contract with defendants it was necessary for him to deliver them a set of plans which would be passed by the Building Inspector; that he had employed Thomas to do the engineering work on the plans for the benefit of defendants; that when they failed to pass inspection defendants were entitled to look to him (Clover) for a set of plans that would be approved even though it was Thomas' part of the work that was involved, and not his, and that defendants would not owe him any more money for whatever additional work became necessary to secure the Building Inspector's approval. He also testified that he had told defendants they could find out the nature of the changes by calling Thomas; that they could pick up the plans at his office when they were completed and could destroy or disregard the old set when they got the new one. After construction was under way Clover had many discussions with defendants and, as he put it, was "beseiged" by them respecting practically every phase and stage of the construction. During these discussions he used the original tracings of the revised plans which he kept in his office. He never saw a set of the revised plans in defendants' possession.

Plaintiff testified that Clover's first set of plans did not show the I-beam in the manner in which a temporary or removable partition would be shown, since it showed "a full partition with electric wiring, and everything else, in it." The plumbing sub-contractor, Serpa, a man with long experience as a plumbing contractor, testified that in the original Clover plans (on which he had made his bid) the I-beam did not indicate a temporary partition, but a permanent one, and that he in fact had planned to run the plumbing lines inside that middle wall.

Theresa Kluge testified that she first received a copy of the revised plans in March, 1948, which she said was the first time she knew that the elimination of the I-beam meant that the partition would be a permanent one. She testified that she was then told by plaintiff's employees that the Building Inspector had ordered the I-beam out. Her sister testified likewise. Plaintiff's foreman, Limegrover, testified that the new plans were shown to defendants on the job but that the changes were not discussed in detail with them. Pardini said that he delivered a copy of the revised plans to Theresa Kluge a day or so after the issuance of the permit, which would be in the early part of October, 1947 and another set in March, 1948.

The original Clover plans adopted the specifications drawn by Kress & Gibson, which contained the following provision:

> "It is understood that the owner shall have the right *during the progress of construction* to make any alterations, additions, or omissions that he may desire, *to work or material herein specified or shown on drawings.* The same shall be carried into effect by the contractor without in any way violating or vitiating the contract, but if such changes are made the value of same must be agreed upon in writing between owner and contractor. No

> omissions will be allowed or extra work paid for unless ordered in writing by the owner." (Emphasis added.)

Appellants have not made it clear how or why this provision bears on the issues in this case since the changes in the plans were not such changes as were contemplated by such a provision. It was designed to protect the owner, to whom it gave the right to a change of mind "during the progress of construction." The elimination of the I-beam was not accomplished during the progress of construction since respondent could not commence to perform his contract "as per plans and specifications" (which was his obligation) until the building permit issued, and it was not issued until after the I-beam had been eliminated.

[1] Appellants rely on such cases as Brown v. Coffee, 17 Cal.App. 381, 121 P. 309, 311, Albert Steinfeld & Co. v. Broxholme, 59 Cal.App. 623, 211 P. 473, and Monson v. Fischer, 118 Cal.App. 503, 5 P.2d 628, in arguing that "Even a licensed architect is an agent with limited authority, and it is the general rule that such architect does not have authority to unmake, change, modify, or alter the contracts of his principal." That rule may be conceded, but the three cases cited have no bearing on this case since here, (a) by the undisputed testimony Clover's contract with appellants bound him to produce a set of plans which would pass inspection, and (b) respondent could not start work until he got such plans. Moreover, there was no substantial variance between the original set of plans and the revised set as far as the *wall* was concerned, since both the plaintiff and the witness Serpa testified that Clover's original plans, in addition to calling for an I-beam, provided for a wall beneath it *but that such wall had not been designed as a temporary one*, but as a permanent one, with plumbing and electric wiring carried within it. That testimony was uncontradicted. For these reasons there is no question in this case of a change or modification of a contract already made, by an architect without express or implied authority. There was no substantial change in the wall. Admittedly there was a change by the elimination of the I-beam but it does not appear how any question of agency can arise as between the defendant-owners and the plaintiff-contractor respecting such change or variance since the plaintiff had nothing whatever to do with it. Clover's contract with defendants, according to his uncontradicted testimony and theirs, was that he had to produce a set of plans which would pass the Building Inspector and that his obligation to the owners was a continuing one until he did so. The first set did not pass, and one of the reasons, as we have seen from Lotz' testimony, was that the I-beam was too light. The evidence, including appellants' own testimony, shows without question that appellants, who were Clover's principals, looked to him, their agent, to meet his commitment to them by revising the plans. It shows also that plaintiff, who was merely standing by, waiting for an approved set of plans, knew that defendants were looking to Clover (assisted by Thomas and Savio) to produce them. Plaintiff had no reason to make any inquiry into the nature or extent of Clover's authority. It was manifested by defendants themselves. See Robinson v. American Fish, etc., Co., 17 Cal.App. 212, 119 P. 388 and Fairbanks v. Crump, etc., Co., 108 Cal.App. 197, 291 P. 629, 292 P. 529, both cited approvingly in Brant v. California Dairies Inc., 4 Cal.2d 128, 135, 48 P.2d 13.

When the revised plans were approved by the Building Inspector plaintiff *for the first time* had a set of plans with which he could start work.

Clover had the authority, admittedly, to make the first set of plans and it appears beyond question from defendants' own testimony that that authority continued until the plans were ultimately approved, see Quinn v. Dresbach, 75 Cal. 159, 16 P. 762; Dunlap v. Dean, 109 Cal.App. 300, 308, 292 P. 991; Otis v. Winter Inv. Co., 138 Cal. App. 682, 33 P.2d 4; Restatement, Agency, § 106.

The foregoing summary of the relations of the parties simplifies the discussion of appellants' principal contention, which is *that the court erred to their prejudice in giving several agency instructions proposed* *by plaintiff and refusing others tendered by themselves.* They argue that plaintiff's instructions numbered 10, 11 and 14 violated the constitutional provision that "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Art. VI, § 19.

Plaintiff's instruction 11 charged the jury "that Leonard Clover and Mark Thomas were the agents of defendants in the preparation of the original and revised plans * * * and the defendants are bound by all acts of said Leonard Clover and Mark Thomas as if they had been performed by the said defendants personally."

Admittedly this left nothing for the jury to decide respecting the existence and continuance of Clover's and Thomas' authority.

Plaintiff's instruction 10 told the jury:

> "If you find * * * that the defendants employed * * * Clover to prepare certain plans * * * which plans * * * Clover guaranteed to the defendants would meet and pass all building requirements, and * * * that by reason of the fact that the said plans * * * failed to meet the building requirements * * * and for that reason required revision thereof, and if you find that the original plans were returned, pursuant to directions of the defendants for the purpose of such revision, to * * * Clover or to Mark Thomas * * * and that said plans were revised and redrafted by * * * Clover, and subsequently delivered to the plaintiff by the said Leonard Clover and/or Mark Thomas, as being the revised and redrafted plans of the said building, *then you are instructed that the said revised and redrafted plans were the plans of defendants and that the said defendants are bound by any of the acts of the said Leonard Clover and/or Mark Thomas in the revision thereof as fully and completely as if the said defendants had authorized said parties to make the said revisions therein.*" (Emphasis added.)

[2] Plaintiff's instruction 10 seemingly did not violate Art. VI, § 19, since it contains five distinct predicates based on the formula "if you find". See Reed v. Simpson, 32 Cal.2d 444, 452, 196 P.2d 895, 900; Clarke v. Volpa Bros., 51 Cal.App.2d 173, 179, 124 P.2d 377; 24 Cal.Jur. p. 841–842, § 101.

However, plaintiff's instruction 14 did charge on the facts. It told the jury "that the *evidence is uncontradicted that the original plans* * * * were prepared and drafted by Leonard Clover, with the assistance of Mark Thomas, Engineer. You are instructed that in the preparation of these original plans * * * Clover and * * * Thomas were acting as the agents of defendants in the preparation and engineering of said plans. The evidence is further uncontradicted that these original plans were modified by * * * Clover and * * * Thomas. If you should find that the defendants instructed the plaintiff to return the said original plans to Leonard Clover and/or Mark Thomas for modification, or that the defendants, by their action or conduct, negligently caused the plaintiff to believe that he was instructed to return said plans to Leonard Clover and/or Mark Thomas for modification, and that the plaintiff did return said plans to them * * * for either of the above reasons, and if you should further find that the defendants failed to notify the plaintiff that the said Leonard Clover and/or Mark Thomas * * * were no longer the agents of defendants, and that subsequently plaintiff received certain modified plans from the said Leonard Clover and/or Mark Thomas and proceeded to construct * * * in conformity with said modified plans, then *the defendants are bound by the acts of Leonard Clover and/or Mark Thomas in the modification of the said plans as fully* and *completely as if the said defendants had authorized said parties to make the said modifications.*" (Emphasis added).

We agree with appellants that instructions 11 and 14 charged on the facts. We do not agree, however, "that questions respecting authority of Clover or Thomas, actual or ostensible, were essentially questions of fact for the determination of the jury." As already appears their continued agency appears by evidence which is wholly uncontradicted. As was said in Dean v. Ross, 105 Cal. 227, 231, 38 P. 912, 913, cited by appellants: "It is only where the fact is admitted, or *there is no shadow of conflict of evidence* with respect to it, that the court is justified in taking it [i. e. a question of fact] from the consideration of the jury." (Emphasis added.) Here there was "no shadow of conflict."

[3] At 24 Cal.Jur. pp. 836–838, § 98, it is said that a violation of Art. VI, § 19, "does not warrant a reversal when the facts as to which the charge is made are admitted or uncontradicted, or where no other conclusion could be reasonably made from the evidence * * *."

[4] Plaintiff's instructions 10 and 14 are inconsistent one with the other since the former leaves several questions to the jury, while the latter tells the jury that those questions are settled by uncontradicted evidence. But no prejudicial error could have resulted, since the jury could not have found on any of the questions in instruction 10 otherwise than in the affirmative, and it is not "error to assume the existence of a fact which is undisputed", 24 Cal. Jur. pp. 842–843, § 101. The inconsistency presents no problem as is found, for example, in such cases as Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675, where it is impossible to tell which instruction controlled the jury.

[5] In their closing brief appellants say "Appellants' problem on this branch of the case therefore resolves itself into the simple one of demonstrating to this court that there was enough evidence in the record on the issue of agency, liberally viewed in the light most favorable to appellants, to justify its submission to the jury as one of fact." They are there invoking the rule that a court must give instructions if there is any substantial evidence supporting the theory of the party tendering them. But again we must say that the testimony here was so clear that Clover's authority continued until he had produced a set of plans that would pass the Building Inspector, that no room was left for any other theory.

Plaintiff's instructions 15, 16 and 17 merely gave the jury §§ 2315, 2316 and 2317 of the Civil Code. These abstract definitions could not have raised any conflict, created any confusion, or resulted in any error.

Appellants assign as prejudicial error the refusal of their tendered instructions 10, 11, 12, 14 and 16. By these instructions, as they say, "defendants sought to have the question of agential authority submitted to the jury as one of fact." The tendered instructions were as follows:

> "You are instructed that * * * Thomas, and * * * Clover * * * were not parties to the contract, and cannot, in the absence of authority, bind the owners to a change in their contract with the plaintiff * * * and themselves. Unless, therefore, you find that the owners consented to such changes as between the first set of plans and the revised plans the plaintiff is not entitled to recover, as there has been no substantial performance of the contract." (Emphasis added.)
>
> "If you find from the evidence that * * * Clover, was without authority to remove the I beam and bonding beam, and that the Kluges did not consent to the removal of said I beam and bonding beam, then you must determine from the evidence whether * * * Clover, had the apparent authority or ostensible authority to bind the owners. You must as well find that the plaintiff * * * had the right to rely and did rely upon this ostensible or apparent agency. The burden of proving such ostensible authority or apparent authority is upon the party asserting it. That is, it is up to the plaintiff * * * to show by a preponderance of the evidence that Leonard Clover * * * had such apparent authority or ostensible authority and that he had a right to rely upon this, and did in fact so rely." (Emphasis added.)

> "You must find by a preponderance of the evidence that * * * plaintiff, was entitled to rely upon the ostensible authority of * * * Clover * * * To bind the owners, and you must further find that * * * Clover * * * did have such apparent or ostensible authority before you can have occasion to determine whether there has been substantial performance of the contract."
>
> "You must determine whether Mr. Heple was under a duty to discuss changes in the plans with the owners before you can allow him a recovery. You shall determine from all the evidence before you whether the plaintiff * * * was in good faith, and one of the factors to consider in arriving at a determination concerning his good faith is the custom and usage in the contractors' trade."
>
> "If you determine from the evidence and the other instructions * * * that the contractor * * * was not in good faith in proceeding to build by the revised plans without first discussing the revised plans and explaining them to the owners, he is not entitled to recover."

These five proffered instructions were contrary to the plaintiff's instructions already discussed, which told the jury as a matter of law that Clover's and Thomas' authority continued on until an approved set of plans had been delivered to plaintiff. If our conclusion is correct that plaintiff's instructions were properly given, then these five instructions were, of course, properly rejected.

Appellants next assign as error the giving of instructions respecting the contract between appellants and respondent. The court gave plaintiff's instructions 6, 12 and 13. Plaintiff's 6 reads:

> "You are instructed that in determining whether or not the plaintiff * * * has furnished substantial performance of his said contract with the defendants, you are to consider the revised plans as being the plans mentioned in the contract * * * according to which plans plaintiff was required to construct the said building for the defendants. To further clarify, *you are to completely disregard the original plans* prepared by Leonard Clover in determining whether or not plaintiff has furnished substantial performance of his contract with the defendants." (Emphasis added.)

[6] Under the evidence this instruction was proper since plaintiff could not have commenced construction until he had legal plans to build by, and this meant, obviously, the revised set.

Plaintiff's 12 reads:

> [7] "If you find from the evidence that the defendants notified plaintiff, either orally or in writing, that they would not accept his performance unless he completed the building in conformity with the original plans, then I instruct you that you shall treat such a demand, if any, as an unwarranted condition to defendants' offer to perform their part of the construction contract, and if plaintiff had not violated the contract on his part, he was entitled to regard such demand, if any, as a repudiation of the contract by defendants, and plaintiff was justified in stopping all further work on the said contract."

In the first place, plaintiff was told by defendants in their letter of April 6, 1948, unequivocally, "do not continue your building operations", and he stopped. Secondly, plaintiff's obligation to build "as per plans and specifications" meant—and could *only* have meant—"as per *legal* and *approved* plans", hence there was no way whereby he could have "completed the building in conformity with the original plans" which had been rejected. The evidence is undisputed that appellants were in touch with Clover and Thomas with respect to the changes made necessary by the Building Inspector's rejection of the original plans. Any notice by appellants to respondent "that they would not accept his performance unless he completed the building in conformity with the original plans" would have been a futile and an idle act and would have rendered impossible the performance of his contract by respondent. There was no error in instruction 12.

Plaintiff's 13 reads:

> [8] "You are instructed that even though the written specifications, which were a part of the contract between the plaintiff and defendants in this action, provide that there could be no modifications or changes in the terms thereof except by an agreement in writing, said specifications could be altered or modified by an executed oral agreement. If you should find that the plaintiff and the defendants orally agreed to change any term or terms of the said plans or specifications and that the said plaintiff fully performed the terms of the said oral agreement of modification, then neither party to this action can now complain that the said modification or change was not authorized or valid."

Earlier we have quoted the provision in the specifications respecting changes and have pointed out that the changes which that provision was designed to cover were not such changes as were made by these revised plans since the I-beam was eliminated before construction commenced or could legally commence. However, we find no error in the instruction, of which appellants can complain.

At defendants' request the jury was given defendants' instruction 13 reading:

> "You are instructed that the contract entered into between the Kluges and Heple consisted of four items; *the original plans,* the specifications, the written bid submitted by Mr. Heple, and the oral acceptance of the Kluges of that bid. The provisions of the specifications are as much a part of the contract as the bid itself, and the plaintiff * * * is bound by the terms and provisions of the specifications. The specifications provide that no omissions will be allowed unless ordered in writing by the owners. There is no evidence that the owners consented in writing to a change in the plans, and therefore unless you find that the owners waived this provision or by their conduct or acts have estopped themselves from asserting this provision, this provision requiring a writing must control. Such estoppel or waiver must be shown by a preponderance of the evidence." (Emphasis added.)

In discussing plaintiff's instruction 13 we pointed out that the provision in the specification was not designed for the revision in the plans made in this case. The same may be said respecting defendants' instruction 13. However, there is a conflict between plaintiff's instruction 6 which told the jury to "completely disregard the original plans" while this instruction told the jury that the contract consisted of "the original plans". The conflict could not possibly have confused the jury, in view of the uncontradicted evidence in the record respecting the rejection of the original plans and the preparation and adoption of the revised set.

Finally, appellants claim prejudicial error in the giving of plaintiff's instruction 18 respecting the amount of the recovery. The prayer of the complaint was for \$19,354.38, while the verdict was for \$18,669.47, or \$684.91 less. The instruction told the jury that the evidence was uncontradicted that plaintiff had expended \$19,869.47 for labor, materials, equipment rental and contracting services. The verdict was for exactly \$1,200 less than the latter figure, which would indicate that the jury followed the substantial performance instructions and deducted \$1,200 for deviations or variances.

[9, 10] Appellants argue that "At the beginning of this instruction the jury was informed, as a matter of law, that plaintiff's testimony was to be accepted as true". That is not correct. It informed them that the evidence was uncontradicted, and so it was, since the plaintiff alone testified as to how much he had expended. His testimony was not contradicted and it was supported by invoices and time cards. Even defendants' witness Massett stated that he was not prepared to say that plaintiff did not expend the amount to which he testified. "(T)he jury may, provided they do

not act arbitrarily, reject in toto the testimony of a witness, even though, in some cases, the testimony of such witness is uncontradicted". 27 Cal.Jur. p. 184, § 156; see, also, 10 Cal.Jur. pp. 1143–1144, § 362. There was testimony for the defense that the fair and reasonable value of the items which had gone into the building was $15,985 but the jury did not adopt that *estimate* as against plaintiff's testimony as to his *actual outlay*. Since the verdict was for less than the amount prayed for (and $1,200 less than $19,869.47) no problem is presented of a verdict for more than the sum demanded.

There is error in the record arising from the conflicting instructions already noted, but it was harmless. We find no prejudicial error.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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114 Cal.App.2d 571

DAVID v. GOODMAN.

Civ. 14921.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1952.

Hearing Denied Feb. 2, 1953.

Action to rescind a partnership agreement and for an accounting, wherein defendant filed a cross-complaint. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment for plaintiff, from which defendant appealed, and from portion of judgment denying interest, plaintiff cross-appealed. The District Court of Appeal, Goodell, J., held that where trial judge died after hearing the evidence, making findings and entering interlocutory judgment ordering an accounting, but before entry of final judgment, defendant was entitled to a trial de novo.

Judgment reversed with direction.

1. Judges 🔑32

A party litigant is entitled to a decision upon the facts of his case from judge who hears the evidence, where the matter is tried without a jury, and he cannot be compelled to accept a decision upon the facts from another judge.

2. Judges 🔑32

Where a case is tried by the judge and the issues remain undetermined by him, his successor cannot decide or make findings in the case or render a valid judgment or decree, without a trial de novo, even though testimony was written down and preserved.

3. Judgment 🔑5
Trial 🔑400(1)

Findings are not essential to the validity of an interlocutory judgment, and findings or conclusions made at time of entry of such judgment are subject to change or modification at time of entry of final judgment.

4. Account 🔑19

An interlocutory decree ordering an accounting is not to be construed as a final determination of the rights of the parties with respect to any of the matters embraced therein.

5. Judges 🔑32

Where trial judge died after hearing the evidence, making findings, and entering interlocutory judgment declaring partnership agreement void and ordering defendant to account to plaintiff, but before entry of final judgment, defendant was entitled to a trial de novo, and, in absence of waiver or consent, another judge could not appoint a referee to state an account and confirm referee's report without a trial de novo.

◆

Cooley, Crowley & Gaither, San Francisco, for plaintiff-cross-appellant.

J. W. Ehrlich, Roy A. Sharff and John Shortridge, San Francisco, for defendant-cross-respondent.

GOODELL, Justice.

On August 18, 1950 judgment was entered in favor of plaintiff for $13,717 and costs. It contains the following provision: "Interest on said sum of $13,717 at the rate of 7% per annum from November 4, 1946 to the date hereof in the sum of $3,637.51 is denied." Defendant appealed from the judgment as a whole. Plaintiff appealed from the part just quoted disallowing interest.

This is the second time the case has been before this court. In 1946 plaintiff sued defendant for the rescission of a partnership agreement and an accounting. Defendant filed a cross-complaint in which he sought a dissolution, an accounting, and the appointment of a receiver. Plaintiff in her answer to the cross-complaint prayed for an adjudication that the partnership agreement be declared null and void. The case was heard by Honorable James G. Conlan who made findings and entered judgment wherein the partnership agreement was declared null and void and defendant was ordered to account to plaintiff. Defendant appealed, and after submission on the merits this court on its own motion dismissed the appeal on December 14, 1948, holding that the judgment was merely interlocutory, hence not appealable. David v. Goodman, 89 Cal.App.2d 162, 200 P.2d 568.

Judge Conlan passed away on June 10, 1949 before any further steps had been taken.

In February, 1950 plaintiff substituted her present counsel for counsel who had appeared on the appeal, and they moved for a reference for an accounting. Defendant thereupon moved for a trial *de novo* on the ground that Judge Conlan had died before the completion of the trial and "no final judgment had been entered and further proceedings were necessary in order to permit the court to arrive at a final judgment" and it would be impossible for another judge to finally adjudicate the rights of the parties without the opportunity by way of a new trial to become familiar with all the facts and the law pertaining to the litigation.

Plaintiff's motion for a reference was granted and defendant's motion for a trial *de novo* denied. The court appointed a certified public accountant as referee to state an account of the business for the period from March 9 to November 4, 1946, and report thereon.

When the referee's report was filed plaintiff moved for its confirmation "upon the ground that said report is just and equitable and should be confirmed", and for judgment in accordance therewith.

Defendant immediately made another motion for a trial *de novo* on grounds similar to those urged in the original motion, which substantially presented the reasons (now relied on for a reversal) why a trial *de novo* was necessary. It presented, also, the ground that the report did not cover all the matters touched on in the interlocutory judgment and that it would be impossible to arrive at a final judgment based solely on the report.

Defendant also filed objections to the report.

The proceedings before Judge Conlan, eventuating in lengthy findings and the interlocutory judgment, consumed 10 trial days during which 16 witnesses were examined whose testimony was reported in 831 pages of transcript, and 46 exhibits were introduced. Such was the state of the record when the case was reassigned after Judge Conlan's death.

The hearings thereafter were restricted by the court to the examination of objections to the referee's report. The court announced repeatedly that there would be no retrial. At the first hearing there was this colloquy:

> "Mr. Shortridge: But apparently * * * I have been unable to convince your Honor that there is far more to it than any report that Mr. Kasch could possibly make up.
>
> "The Court: In other words, you want to start de novo?
>
> "Mr. Shortridge: I think Mr. Goodman is entitled to it.
>
> "The Court: You are not starting de novo, unless you can show me that this report is not correct."

And when defendant was on the stand the court said: "You see, I can't go behind what the other judge found. The other judge found that you were not a partner."

As a result of these hearings the court cut down the figure ($15,011.57) for which it had originally intended to award judgment, to $13,717, and entered the judgment now appealed from without making any findings. The judgment after referring to the findings made by Judge Conlan, recites the 1950 reference for an accounting and the referee's report. It incorporates the interlocutory judgment by reference; approves the report as modified; adjudges $13,717 for plaintiff with costs, and orders each party to pay half the referee's fee. After its entry a new trial was denied.

Appellant states his principal contention as follows: "Appellant's legal right to have his case heard and finally determined by one trial judge was violated. Judge Conlan's judgment was interlocutory and subject to amendment. Therefore upon his death appellant's motion for a new trial should have been granted." Subsidiary to that contention, but definitely a part of it, is appellant's further claim that "a trial court is without power to enter a judgment based upon findings made by another judge."

[1] The leading case in this state on the subject is Guardianship of Sullivan, 143 Cal. 462, 77 P. 153, 155, an incompetency proceeding. There it appears that "The evidence was all taken and the examination of the alleged incompetent had before one judge, who has never given any decision in the matter. The matter was subsequently argued and submitted for decision to another judge, who never heard any of the witnesses testify, and before whom * * * no report of the testimony was ever produced. He orally decided * * * that letters of guardianship should issue. The only order or judgment ever entered was signed by still another judge, who had never heard either evidence or argument." In reversing the order the court said: "A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury * * *. He cannot be compelled to accept a decision upon the facts from another judge * * *." That case has been followed in In re Williams, 52 Cal. App. 566, 199 P. 347; Hughes v. De Mund, 96 Cal.App. 365, 274 P. 405; City of Long Beach v. Wright, 134 Cal.App. 366, 25 P.2d 541; McAllen v. Souza, 24 Cal.App.2d 247, 74 P.2d 853, and Reimer v. Firpo, 94 Cal. App.2d 798, 212 P.2d 23. See, also, De Mund v. Superior Court, 213 Cal. 502, 505, 2 P.2d 985, and Foss v. Commissioner, 1 Cir., 75 F.2d 326, 329.

[2] Hughes v. De Mund, supra, was an accounting suit. The first hearing was before one judge who entered an interlocutory judgment, and after the accounting further hearings were had before a different judge. It was held to be error, in the absence of consent or waiver, for the second judge to make findings and decide material issues from the evidence introduced before the judge who presided over the first hearing. The court quoted 33 Corpus Juris, p. 973 as follows: "Where a case is tried by the judge, and the issues remain undetermined by him, his successor cannot decide, or make findings in the case, without a trial *de novo,* and consequently he cannot, in such a case, render a valid judgment or decree in the cause, notwithstanding the testimony may have been written down and preserved." See, also, 48 C.J.S., Judges, § 56.

In McAllen v. Souza, 24 Cal.App.2d 247, 74 P.2d 853, supra, the trial court heard certain evidence, made findings thereon, and entered an interlocutory judgment ordering an accounting. The defendant's appeal therefrom was dismissed, McAllen v. Souza, 7 Cal.App.2d 130, 45 P.2d 832, because the judgment appealed from was not final. Thereafter, and before any further proceedings the judge died (just as here). A motion to set aside his judgment on the ground that the cause had been only partly tried; that no final judgment had been entered, and that defendant was entitled to have a decision upon all the facts from a judge who had heard all the evidence was granted, and (unlike this case) a trial *de novo* was ordered before a second judge, who decided in favor of the defendant. The plaintiff appealed, and this court in affirming the judgment said: "We therefore conclude that after the death of Judge McKenzie, which occurred prior to the entry of final judgment, no other judge could, in the absence of consent or waiver, proceed with the trial of the cause except upon a trial *de novo* and that the trial court therefore properly granted the motion of respondent to set aside the interlocutory decree which had been entered by Judge McKenzie." [24 Cal.App.2d 247, 74 P.2d 856.] A hearing was denied by the Supreme Court and the case has been cited approvingly by that court in Holmes v. Hatch, 11 Cal.2d 376, 387, 80 P.2d 70, and Bartholomae Oil Corporation v. Superior Court, 18 Cal.2d 726, 728, 117 P.2d 674.

[3, 4] It is clear from the record that the case was treated by the trial court as though Judge Conlan's findings were final and conclusive except for the account. In the first place, findings are not essential to the validity of an interlocutory judgment, Welch v. Alcott, 185 Cal. 731, 761–762, 198 P. 626; Holmes v. Hatch, 11 Cal.2d 376, 387, 80 P.2d 70; Hughes v. De Mund, 96 Cal.App. 365, 368, 274 P. 405, supra; McAllen v. Souza, 24 Cal.App.2d 247, 250, 74 P.2d 853, supra; Lacey v. Bertone, 109 Cal.App.2d 107, 112, 240 P.2d 395, but even if they were, it is settled by the authorities cited earlier that a judgment entered by a judge other than the one who heard the evidence and signed the findings *(in a case such as this)* is not valid. Moreover, findings or conclusions made at the time of the entry of an interlocutory judgment are "subject to change or modification at the time of entry of the final judgment" and "An interlocutory decree, in a case such as this [accounting], 'is not to be construed as a final determination of the rights of the parties with respect to any of the matters embraced therein.' [Citations.]" McAllen v. Souza, 24 Cal.App.2d 247, 250–251, 74 P.2d 853, 855, supra.

There was no consent or waiver in this case; appellant's counsel repeatedly insisted on the right to a retrial of the case in its entirety, while the court restricted the hearing to an examination of the referee's report.

Respondent cites two authorities from other jurisdictions, St. Louis Southwestern Ry. Co. v. Henwood, 8 Cir., 157 F.2d 337, 342 and Hoffman v. Shuey, 233 Ky. 70, 2 S.W.2d 1049, 58 A.L.R. 842, 846, but when a question is as well settled in the state as this is, there is no reason to resort to outside authorities.

Respondent relies on Bartholomae Oil Corporation v. Superior Court, 18 Cal.2d 726, 117 P.2d 674, supra, a mandate proceeding to compel the Superior Court to vacate an interlocutory decree and grant a trial *de novo*. There Judge McKeage after a hearing signed an interlocutory decree ordering an accounting. While the accounting was under way Judge McKeage's term of office expired and a successor took his place. Had the situation thus continued that case would be similar to this, but after a short time Judge McKeage was returned to the same Court by appointment of the Governor. When, after the accounting had been completed, the time came to resume hearings the case was again assigned to him. The court denied the writ, holding that there was no necessity for a trial *de novo* since the Judge who had heard the first part of the case could, of course, hear the rest of it. A somewhat similar situation is found in De Mund v. Superior Court, 213 Cal. 502, 2 P.2d 985, supra, where the visiting Judge who presided at the first hearing and ordered the accounting was again assigned to sit in Los Angeles and hence was available to hear the rest of the case. The Bartholomae case does not help respondent.

To again quote McAllen v. Souza, 24 Cal.App.2d 247, 251, 74 P.2d 853, 856:

> "In view of the nature of said interlocutory judgment, we are of the opinion that, when [the first judge] died after the entry thereof but before the entry of the final judgment, the cause stood in the same position as any ordinary action, not involving an interlocutory judgment, in which the trial judge dies or ceases to hold office after partly trying the action but before the entry of the final judgment therein."

[5] It follows that the court erred in refusing to grant a trial *de novo*.

Appellant makes several other attacks on the judgment, most of them arising on the proceedings prior to the accounting, but there is no need to discuss them in view of the necessity for a new trial.

The reversal of the judgment likewise renders unnecessary a discussion of respondent's attack on the disallowance of interest.

The judgment is reversed with the direction to the trial court to retry the cause from the beginning, and in all its phases. Defendant to have his costs on appeal; plaintiff to pay her own costs.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

LOS ANGELES COUNTY v. DEPARTMENT OF SOCIAL WELFARE et al.*

Civ. 18748.

District Court of Appeal, Second District, Division 3, California.

Nov. 26, 1952.

Rehearing Denied Dec. 23, 1952.

Hearing Granted Jan. 22, 1953.

County brought mandamus proceedings against the State Social Welfare Board and others to compel board to set aside allegedly invalid order. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment in favor of county, and board and others appealed. The District Court of Appeal, Wood, J., held that State Social Welfare Board could not, in effect, order county to discontinue its policy, in determining amount to be given monthly as indigent aid, that amount received monthly by indigent person's spouse as old age security or blind aid should be deducted from amount which board of supervisors of county determined was needed monthly for support of husband and wife, living together, as a family unit.

Judgment affirmed.

1. Paupers 🔑41

The matter of allowing indigent aid is for exclusive determination of board of supervisors of county. Welfare and Institutions Code, §§ 103, 2141, 3000 et seq., 3078.

2. Paupers 🔑43(2)

The amount to be allowed to an applicant for indigent aid is based on needs of applicant as determined by board of supervisors of county. Welfare and Institutions Code, §§ 103, 2141, 3000 et seq., 3078.

3. Paupers 🔑43(2)

State Social Welfare Board could not, in effect, order county to discontinue its policy, in determining amount to be given monthly as indigent aid, that amount received monthly by indigent person's spouse as old age security or blind aid should be deducted from amount which board of supervisors of county determined was needed monthly for support of husband and wife, living together, as a family unit. Welfare and Institutions Code, §§ 103, 2141, 3000 et seq., 3078.

4. States 🔑191(2)

Superior court had jurisdiction of mandamus proceedings against State Department of Social Welfare, which had acted in violation of law, though the state had not consented to be sued in mandamus proceedings. Code Civ.Proc. § 1094.5.

5. Mandamus 🔑63

"Mandamus" is the remedial writ to correct decisions of administrative agencies when such decisions are in violation of law. Code Civ.Proc. § 1094.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Mandamus".

6. Mandamus 🔑141

The superior court has jurisdiction of mandamus proceedings to review decisions of an administrative agency which has exceeded its authority. Code Civ.Proc. § 1094.5.

7. Administrative Law and Procedure 🔑234
Mandamus 🔑13

Rule that administrative proceedings should be completed before issuance of a judicial writ, such as writ of mandamus, does not apply when administrative board is without jurisdiction.

8. Mandamus 🔑13

Where State Social Welfare Board acted contrary to law, superior court in mandamus proceedings against board did not exceed court's jurisdiction by not requiring petitioner to exhaust its administrative remedies by requesting reconsideration. Code Civ.Proc. § 1094.5.

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* Subsequent opinion 260 P.2d 41.

9. Mandamus ⚷73(1)

In mandamus proceeding to compel State Social Welfare Board to set aside its invalid order, superior court did not exceed its jurisdiction in ordering board to dismiss appeals to it by those in whose favor the invalid order had been entered. Code Civ.Proc. § 1094.5.

◆

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondents (named in petition) and appellants.

Kenny & Morris and Eleanor V. Jackson, Los Angeles, for intervenors and appellants.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for petitioner and respondent (on appeal).

WOOD, Justice.

In a petition for a writ of mandate, filed in the superior court, the Department of Social Welfare of California and its director, and the Social Welfare Board of California and its members, were named as respondents. They are the appellants herein. The appeal is from a judgment ordering them to set aside orders which they made upon certain appeals by recipients of old age security and aid to needy blind.

In May, 1949, the Board of Supervisors of Los Angeles County adopted a new policy with respect to giving financial aid to an indigent person whose spouse is a recipient of old age security or aid to needy blind, when the spouses are living together. That policy was to the effect that in determining the amount to be given monthly as such indigent aid, the amount received monthly by the indigent person's spouse as old age security or blind aid should be deducted from the amount which the board of supervisors determined was needed monthly for the support of the husband and wife, living together, as a family unit. Thus, if the supervisors determined that the amount needed monthly for the support of the husband and wife, living together, was $90, and if the husband received $75 per month as old age security, the amount of $15 would be allowed to the wife as indigent aid. Prior to adopting such new policy, the board of supervisors, in determining the amount needed by an indigent spouse, did not regard the old age security or blind aid of the other spouse as family income.

Old age security in the sum of $75 per month is provided by the federal, state, and county governments jointly to persons who have attained the age of 65 years and who have certain residence requirements and certain limited property holdings. The amount paid by each government per month is as follows: federal, $30; state, $38.58; county, $6.42.

Aid to the needy blind in the sum of $85 per month is also provided by those governments to persons with certain degrees of blindness who have certain residence requirements and certain limited property holdings. The amount paid by each government per month is as follows: federal, $30; state, $41.25; county, $13.75.

Applications for old age security and aid to the needy blind are made to, and determined by, the board of supervisors. Such old age security and blind aid are paid by the county with its own money and money furnished by the state and federal governments.

Also applications for indigent aid are made to, and determined by, the county. Such aid is furnished by the county from its own funds and facilities. At the time said new policy of the supervisors (regarding aid to indigents) was adopted, ten certain persons, among many others, were recipients of old age security in the sum of $75 each per month; and one person, among many others, was a recipient of aid to the needy blind in the sum of $85 per month. (The names of those eleven persons are stated in the petition herein.) The amounts received by them were the maximum amounts allowed by statute. At the time of adopting the new policy, each of said persons was married and was living with his or her spouse. Also at said time, each spouse of each such recipient was an applicant for indigent aid. After the new policy became effective, the board of supervisors reconsidered the matter of the amount of aid to be awarded, upon the basis of need, to said indigent spouses. In fixing the amount to be so awarded upon such reconsideration, the board made a determination as to the amount required to meet the needs of the husband and wife living together and then deducted from said amount the amount of old age security or blind aid received by the spouse of the indigent person, and the difference between those amounts (if the amount needed by husband and wife exceeded the amount of old age or blind aid) was the amount awarded as indigent aid. Under the former method of fixing the amount to be awarded to an indigent spouse (wherein old age or blind aid of the other spouse was not regarded as family income), the total amount received by the husband and wife was larger than the total amount received by them under the new method. It may be stated generally that the total amount received monthly by the husband and wife, under the former method, exceeded the total amounts received monthly by them, under the new method, in various sums ranging from approximately $12 to $48.

Each of the eleven persons, acting through the Citizens Committee for Old Age Pensions, sent a letter to the Director of the Department of Social Welfare, stating that he (or she) was dissatisfied with the action of the board of supervisors and was appealing to said department to prohibit the board of supervisors from considering his (or her) $75 old age security grant as family income and allotting a portion of it to meet the needs of his wife (or husband), who is a general relief applicant. The spouse who was an applicant for general or indigent relief was not a party to the appeal.

The Social Welfare Board notified the county that the board would hear the appeals on August 24, 1950. The county, acting through its superintendent of charities, sent a letter on August 17, 1950, to the Social Welfare Board stating that neither the Social Welfare Board nor the Department of Social Welfare of California had jurisdiction over the general relief policy of the county of Los Angeles, and that no representative of the Department of Charities of Los Angeles County would appear at the hearing for the purpose of discussing general relief.

On August 24, 1950, the Social Welfare Board decided that it would hear the appeals; and thereafter the matters were continued to October 20, 1950. On October 18th, the County of Los Angeles filed a petition for a writ of mandate in the superior court (action No. 579018, superior court). An alternative writ of mandate was issued and an order was made temporarily restraining the Social Welfare Board from proceeding further with the appeals. The eleven persons, who had appealed to the Department of Social Welfare, intervened in said action as respondents. On October 30, 1950, the superior court denied the petition for a writ of mandate, discharged the alternative writ and the temporary restraining order. The county appealed from that judgment, and an opinion on that appeal has been filed this day, Cal.App., 250 P.2d 716.

On November 17, 1950, the Social Welfare Board commenced the hearings in said eleven matters. The county of Los Angeles filed written objections to the jurisdiction of the Social Welfare Board, and the objections were overruled. The said board made findings in each of the eleven matters. Some of the findings in the matters pertaining to old age security were, in substance, as follows: Since July 1, 1949, Los Angeles County, pursuant to order of its board of supervisors, has followed the policy of treating payments under the old age security program as income to a family unit, comprising the recipient of such aid and his ineligible spouse, and applying such program payments to the general relief needs of the spouse; the result has been to require the old age security recipient, through duress, to support his (or her) indigent spouse or to let him (or her) starve or live apart; a further effect has been to divert a portion of old age security to the support of a spouse of a recipient, thus diverting federal or state funds from the purpose for which they were appropriated, and to subsidize the general relief program of Los Angeles County; in the application of said policy Los Angeles County has treated the spouses who were recipients of old age security as paupers on a par with their indigent spouses; by said policy and practice the county has made restricted payments of old age security; federal funds granted to California, on condition that they be used exclusively for old age assistance, have been alienated and diverted to the payment of general relief for indigent spouses; by such practice the county has failed to provide the recipients of old age security with the protection, care, and assistance to which they are entitled under standards established by the old age security law.

The Social Welfare Board made determinations of issues, pertaining to old age security, in substance, as follows: The Social Welfare Board has no general jurisdiction over general relief policy as such; it is not authorized to enforce the duty of the county to make general relief payments to aid indigent persons; however, in order to conform with the requirements of the federal Social Security Act, 42 U.S.C.A. § 301 et seq., the Legislature of California has enacted section 2141 of the Welfare and Institutions Code, whereunder it is the duty of the Department of Social Welfare and the Social Welfare Board to supervise and pass upon the measures taken by the county boards of supervisors for the care of needy aged citizens to the end that they shall receive suitable care and that there shall be throughout the State a uniform method of treatment of aged persons based upon their individual needs and circumstances; it is the duty of the Social Welfare Board to take corrective action wherever a policy of a county obstructs the administration of laws respecting old age security, and such action may take the form of accepting jurisdiction in appeals of adversely affected recipients of old age security, especially where funds granted for such security are restricted in use, alienated and diverted to other purposes; the policy of the board of supervisors in treating old age security as income to the family unit for the purpose of determining need for general relief adversely affects realization of the purposes of old age security; the grant of old age security is for the use of the recipient alone; the basic purposes of the federal and state statutes are violated by the said practice of the county; and it is the duty of the Department of Social Welfare to terminate this policy of the county in order that California shall not be disqualified for further receipt of federal grants-in-aid for old age assistance.

The Social Welfare Board made orders, in the appeals regarding old age security, as follows: Los Angeles County is directed and ordered to discontinue immediately the aforesaid policy of treating a portion of the old age security as income of the recipient's indigent spouse, and restricting the use of such portion to the relief of the indigent spouse, thereby alienating and diverting such portions of the old age security to which the recipient of old age security is entitled; if said county fails to comply with said order within 30 days, the Department of Social Welfare is directed to adjust the claims of the county to disallow reimbursement from federal and state funds in such portion as old age security payments to the recipients of old age security were restricted to the use of indigent spouses of such recipients.

With respect to aid to needy blind, the findings of fact, determination of issues, and order of the Social Welfare Board were in substance the same as the findings, determinations, and orders with respect to old age security.

The trial court found, among other things, that each of said eleven persons was and is receiving the maximum amount of old age assistance or aid to needy blind to which each person was and is eligible; the spouse of each said person applied to the county for general relief, and the county has in each case determined eligibility for the amount and kind of relief to be given to said spouse and has granted said relief in the manner determined by it; said spouses who applied for such relief are not parties to the appeals filed with the Social Welfare Board; none of said eleven persons appealed upon the ground that the supervisors ordered a payment of old age security or aid to blind less than the maximum to which he was entitled by law; in each case the appellant and the spouse applying for general relief were living together and sharing a common residence; the county declined to be present at the hearing before the Social Welfare Board on August 24, 1950, on the grounds (1) that said board had no jurisdiction to control, review or determine eligibility for general relief or the amount and type of general relief to be paid by the county, and (2) the sole issue raised by each appellant was the inadequacy of the general relief payment by the county to the spouse of the appellant and that said board had no jurisdiction to determine the general relief policy of the county; at the hearing on November 17, 1950, the county filed written objections to the jurisdiction of said board, and the objections were overruled; the board proceeded to hear, and did render its decision in, the said matters; the findings of fact, determination of issues, and the orders made by the board determine the eligibility for and the amount and type of general relief to be paid by Los Angeles County to applicants for general relief, and said orders threatened to, and the board announced that it would, withhold payment of federal and state funds due to the county for old age and blind aid programs unless the county complies with the determination of said board as to the eligibility for and the amount and type of general relief to be paid by the county; the action of the board with respect to each appeal is void and in excess of and without jurisdiction in that: (a) said orders determine the eligibility for and the amount and type of general relief to be paid by the county for general relief, (b) the orders withhold payment of federal and state funds due to the county for administration of old age assistance and aid to needy blind, (c) the orders illegally coerce and compel the county to grant general relief in amounts found by said Social Welfare Board, contrary to the statute which gives the board of supervisors sole and exclusive authority to determine eligibility for and amount and type of general relief, including the right of the supervisors to determine the amount of property an applicant may be permitted to own while receiving general relief, and including the further right to determine whether work will be required as a condition to the receipt of general relief; said orders determine the amount of general relief to be paid by the county to persons who are not parties to the proceedings before the Social Welfare Board and who are not under the jurisdiction of said board; the action of said board constitutes a prejudicial abuse of discretion because there is no evidence to support certain of its findings of fact (specifically referred to in the findings of the court); the said determination of issues and said orders of the board constitute a prejudicial abuse of discretion because they are based on findings which are not supported by the evidence and are in excess of the board's jurisdiction; and that petitioner has no plain, speedy and adequate remedy at law.

The judgment of the trial court was that findings of fact, determination of issues, and orders of the Social Welfare Board in each of the eleven appeals are void; that a writ of mandate issue requiring the respondents (named in the petition) to set aside the said findings of fact, determination of issues, and orders; that respondents (named in the petition) deny the appeals and desist from any action whereby they withhold any portion of federal and state funds due to the county; that the matter of the eleven appeals is remanded to the said respondents with directions to proceed in conformity with said judgment.

Appellants herein (Department of Social Welfare, Social Welfare Board, and the eleven intervenors), contend that: (1) the Department of Social Welfare and the Social Welfare Board proceeded within their jurisdiction; (2) the Social Welfare Board did not abuse its discretion, and (3) the superior court exceeded its jurisdiction.

As to the first contention, appellants argue to the effect that the Department of Social Welfare had jurisdiction to make said orders on appeal because it was the single state agency authorized to supervise the joint administration of federal-state-county aid to needy aged and blind, and that Los Angeles County in regarding such aid as family income, when determining the amount of *indigent* aid to be paid from county funds to a spouse of a recipient of *old age security or blind aid,* was making a restricted payment of social security funds (federal, state and county) in violation of a regulation against restricting or limiting such payments.

Respondent (County of Los Angeles) agrees that the Department of Social Welfare has authority to supervise the acts of the counties in the administration of old age security and blind aid. In such administration "grants-in-aid" are made to the counties by the federal and state governments. Division III of the Welfare and Institutions Code pertains to "Old Age Security-Administration", and section 2141 of that code, which is in said Division, provides: "The State Department of Social Welfare shall supervise and pass upon the measures taken by the county boards of supervisors for the care of needy aged citizens * * *." Division V of said code pertains to "Aid to Needy Blind", and section 3078 of that code, which is in said Division, provides: "The Department of Social Welfare may, on behalf of the State, at any time inquire into the management by any county of aid to blind persons under the provisions of this chapter * * *." Section 103 of said code provides: "The Social Welfare Board hereby established, shall advise the director in the performance of his duties * * *. The board shall have the power and it shall be its duty to adopt, promulgate, repeal and amend rules and regulations consistent with law for the administration of welfare. Except as otherwise provided by law, the board shall establish minimum standards of public assistance, not in conflict with law, for all relief purposes for which State grants-in-aid are made to the counties. *The board shall have no administrative or executive functions other than those set forth in this code.*" (Italics added.)

[1-3] Respondent contends that the Department of Social Welfare does not have any authority in the matter of determining the necessity for, or the amount of, indigent aid which is paid by the county alone. Division IV of the Welfare and Institutions Code pertains to "County Aid and Relief to Indigents", and section 2500 of that code, which is in said Division, provides that every county shall relieve and support all indigent persons, lawfully resident therein, when such persons are not supported by their relatives or friends or by state institutions. There is no provision in said Division giving the Department of Social Welfare or the Social Welfare Board any administrative or executive function in the matter of indigent aid which is provided by the counties. It seems to be conceded by appellants that neither the department nor the board has any authority in the matter of indigent aid by the counties. In the decisions of the Board of Social Welfare on the appeals it is stated, as above shown, that the board "has no general jurisdiction over General Relief policy or practice as such." It is the position of the Social Welfare Board that the county did not grant sufficient aid to the indigent spouse, and that the result thereof was that the other spouse, who was a recipient of old age security or blind aid was compelled to divert some of his old age security or blind aid in meeting the needs of his indigent spouse; and that although the Social Welfare Board has no general jurisdiction over the general policy of the county in indigent relief matters, it does have a special or limited jurisdiction under circumstances where, in the judgment of the Social Welfare Board, the county allows an insufficient amount of indigent aid to one spouse and thereby *in effect* restricts or limits the use of the old age security or blind aid of the other spouse. In other words, it seems to be the position of appellants that under such circumstances the Social Welfare Board is not supervising the county in the matter of indigent aid but it is taking "corrective action" to prevent the county from granting aid to a spouse in an amount which the Social Welfare Board believes has *the effect* of restricting the payments of old age security or blind aid to the other spouse. Relief by way of old age security and aid to needy blind, furnished by federal, state and county governments, is separate and distinct from re-

lief by way of indigent aid furnished by the county. As above indicated, the matter of allowing indigent aid is for the exclusive determination of the board of supervisors of the county. See Patten v. County of San Diego, 106 Cal.App.2d 467, 470, 235 P.2d 217. The amount to be allowed to an applicant for such aid is based upon the needs of the applicant as determined by the board of supervisors. The appeals herein, to the Department of Social Welfare, were by recipients of old age security and by a recipient of blind aid. Each of those appellants was receiving the maximum amount which he could receive under the law, namely, $75 per month for old age security and $85 per month for blind aid. None of the appellants asserted, as a ground for appeal, that he had not received his full allotment of old age security or blind aid. In their letters to the Department of Social Welfare, which constituted the petitions for hearings of the appeals, the appellants stated that they were dissatisfied with the action of the board of supervisors and they were appealing to the department to prohibit the board of supervisors from considering their old age security or blind aid as family income and allotting a portion of it to meet the needs of appellants' indigent spouses. It is to be noted that they did not state they were dissatisfied with the action of the supervisors as to the amounts of their awards. The purpose of the appeals was to obtain orders of the Social Welfare Board enjoining or "correcting" the board of supervisors with respect to the manner in which it determines the amount needed as indigent aid. Section 2182 of the Welfare and Institutions Code, in effect at the times involved herein, provided that if a recipient of old age security is dissatisfied with the action of the board of supervisors, he had the right of appeal to the Department of Social Welfare. Section 3086 of said code, in effect at the times involved herein, provided that a recipient of aid to the needy blind also had the right of appeal to said department. In both said sections it is provided that: "The State Social Welfare Board shall consider the appeal, and shall dismiss the appeal or award aid as prescribed in this chapter." It thus appears that such recipients have the right of appeal in matters pertaining to awards of old age security and blind aid; and that the power of the board on appeal is limited to dismissing an appeal or making an award of such security or aid. As above shown, there was no question on those appeals regarding the amount of old age or blind aid which had been awarded. The Social Welfare Board could not award any such aid on the appeals, because each appellant was receiving the maximum amount allowable. There is no provision in said sections to the effect that the Social Welfare Board may enjoin the board of supervisors in matters pertaining to indigent aid or in any matter. The spouses of the appellants (referred to in the appeal petitions), who were applicants for county indigent aid, were not parties to the appeals and could not have been such parties. They were ineligible for old age security or blind aid. The recipients of old age security or blind aid were not authorized to appeal on behalf of their spouses who were applicants for county indigent aid. The matter of reviewing the award of indigent aid by the county was not before the Social Welfare Board. That board could not make an award for such aid. The orders made by that board on appeal, in practical effect, direct the county to discontinue its policy in determining the needs of certain applicants for indigent aid and to pay a greater amount for indigent aid,—those matters being within the exclusive province of the board of supervisors. Also, since indigent aid is paid from county taxes, those orders, in practical effect, direct the board of supervisors with respect to another matter within its exclusive province—that of fixing the rate of taxation. The orders made on the eleven appeals were attempts to do indirectly that which could not be done directly. If the spouses, who were applicants for county aid, considered themselves aggrieved as to the action of the board of supervisors in awarding indigent aid, their remedy would have been by a proceeding in the superior court to review the action of that board. The Social Welfare Board did not have jurisdiction to make the orders.

It is to be noted that after the superior court decided (in May, 1951) that said board did not have jurisdiction to make the orders, two bills regarding the matters here involved were presented to the Legislature—one of which was to the effect that old age security was income of the recipient only; and the other bill was to the effect that aid for the needy blind was income of the recipient only. The bill regarding blind aid became the law in September, 1951, and since then the county has not considered blind aid in fixing the amount of indigent aid for spouses of the needy blind. The Legislature did not pass the bill regarding old age security.

By reason of the above conclusion regarding jurisdiction, it is not necessary to discuss the contention of appellants that the Social Welfare Board did not abuse its discretion.

[4, 5] Appellants also contend that the superior court had no jurisdiction over the Department of Social Welfare, since the state had not consented to be sued in this kind of action. The contention is not sustainable. Mandamus is the remedial writ to correct decisions of administrative agencies which are in violation of law. Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 329, 109 P.2d 935.

[6] Appellants also contend that the "final" decisions of the Board of Social Welfare are not subject to review upon the petition of a county. They argue that after the "final decision" of the board, the county is no longer an interested party or any party entitled to a writ of mandamus; that the board's decisions are not subject to judicial review except at the request of the recipients. They cite section 104.5, subdivision (c), of the Welfare and Institutions Code which provides: "If an appeal, hearing, or rehearing is not heard by the board, a report of the proceedings shall be prepared by the referee conducting it and the report * * * shall be presented to the board for final decision. Only the board may make such final decision." They also cite section 104.6 of that code which provides: "The board of supervisors of each county shall comply with and execute every award of the State Social Welfare Board in favor of an applicant for or recipient of aid to the aged, aid to the blind * * * which is directed to the board of supervisors." The first of said sections pertains to procedure when an appeal or hearing is before a referee. The interpretation of that section is that the report of the referee is not final, but that the final decision under such procedure is to be made by the board. Apparently, the last sentence of that section, namely, "Only the board may make such final decision", was not intended as a provision to exclude a court review of the board's decision. In any event, however, that section and the other section, relate to decisions pertaining to old age security and aid to the needy blind, and do not pertain to indigent aid. The requirement as to compliance by the supervisors pertains only to awards "in favor of an applicant for or recipient of aid to the aged, aid to the blind, * * *." No award was made by the Social Welfare Board to any of the eleven appellants. As above stated, the appellants were receiving the maximum award allowable. By the decisions of the board herein, the county was ordered, as above stated, to change its policy in determining the amount of indigent aid. The superior court has jurisdiction to review decisions of an administrative agency when the agency has exceeded its authority. Board of Trustees v. State Board of Equalization, 1 Cal.2d 784, 787, 37 P.2d 84, 96 A.L.R. 775.

Another contention of appellants is that the superior court exceeded its jurisdiction by reviewing the action of the board prior to the time the board had issued a final order to stop reimbursement of the county for administrative expenses. They argue that the second part of the order of the board was conditional, that is, that unless the county changed its policy within 30 days federal and state funds would be withheld; that until the Department of Social Welfare actually refuses to approve the county's claim for such funds, there is no final order to be reviewed by the court. The board ordered the county to discontinue immediately its policy regarding indigent aid. That part of the order was not conditional. This contention is not sustainable.

[7, 8] Appellants also contend that the court exceeded its jurisdiction by not requiring the county to exhaust its administrative remedies by requesting reconsideration. Under section 1094.5 of the Code of Civil Procedure, a writ of mandamus may be issued for the purpose of inquiring into the validity of any final administrative order. The inquiry "shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; * * *." In McPheeters v. Board of Medical Examiners, 82 Cal.App.2d 709, at page 717, 187 P.2d 116, at page 120, it was said: "Administrative proceedings should be completed before the issuance of a judicial writ. An exception, of course, appears when the administrative board is without jurisdiction." See Bernstein v. Smutz, 83 Cal.App.2d 108, 115, 188 P.2d 48. This contention is not sustainable.

[9] Appellants also assert that the court exceeded its jurisdiction by ordering the board to dismiss the appeals. They argue that the court may not substitute its discretion for that of the board, and that the matter should have been remanded to the board for further action in the light of the court's determination of the law. As above stated, under the provisions of section 2182 of the Welfare and Institutions Code, the board on appeal was empowered to dismiss the appeals or award aid. No question as to the amount of an award was involved on the appeals. Since the board had no jurisdiction in the matter of indigent aid, the only further action that could be taken by the board would be to dismiss the appeals. The court ordered the board to enter an order denying the eleven appeals, and ordered the matter of the appeals remanded to the board with directions to proceed in conformity with the judgment. The court did not exceed its jurisdiction.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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114 Cal.App.2d 827

LOS ANGELES COUNTY v. DEPARTMENT OF SOCIAL WELFARE et al.

Civ. 18503.

District Court of Appeal, Second District,
Division 3, California.
Nov. 26, 1952.

County brought mandamus proceedings against the State Social Welfare Board and others. The Superior Court of Los Angeles County, William B. McKesson, J., entered judgment adverse to petitioner, and petitioner appealed. The District Court of Appeal, Wood, J., held that questions presented on appeal were moot.

Appeal dismissed.

Appeal and Error 🔑790(3)

Where questions presented on appeal to District Court of Appeal had already been determined by District Court of Appeal in companion case involving same questions, questions presented on second appeal were moot, and appeal would be dismissed.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for petitioner and appellant.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondents.

Kenny & Morris and Eleanor V. Jackson, Los Angeles, for intervenors and respondents.

WOOD, Justice.

The County of Los Angeles appeals from a judgment of the superior court denying its petition for a writ of mandamus. This is a companion case to Los Angeles County v. Department of Social Welfare, Cal.App., 250 P.2d 708. This case was referred to in the ninth paragraph of that opinion.

After the Social Welfare Board had assumed jurisdiction of the eleven appeals referred to in the companion case, and before the date set for the hearings on those appeals, the County of Los Angeles filed the petition herein for a writ of mandate commanding said board to set aside its order that it had jurisdiction in the matter of said appeals, and to enter an order that it does not have such jurisdiction. The petition was denied. Thereafter said board proceeded with said hearings and made its findings and orders therein.

It is not necessary to discuss the contentions made upon this appeal. By reason of the decision of this court in the companion case, the questions presented upon this appeal are moot.

The appeal is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

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114 Cal.App.2d 513

GILLESPIE et al. v. CITY OF LOS ANGELES et al.

Civ. 7583.

District Court of Appeal, Third District, California.

Dec. 3, 1952.

Hearing Denied Jan. 22, 1953.

Action for damages for death of occupants of automobile which went off road. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered judgment for defendant State, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that where the State engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to statutory provision authorizing persons with claims not allowed by State Board of Control to bring suit against State on such claims.

Affirmed.

1. States 🔑**112**

Where the state engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to statutory provision authorizing persons with claims not allowed by State Board of Control to bring suit against State on such claims. Pol.Code, § 688.

2. States 🔑**112**

The State is not liable in tort for negligence of its officers, agents or employees which occurs while the State is acting in sovereign or governmental capacity.

3. Automobiles 🔑**252**

Action against State based on alleged dangerous condition of highway, consisting of sharp, unmarked curve without guardrails or warning signals, in what appeared to be straight and continuous road, would not lie, since maintenance of public highways is proprietary function of State. Pol.Code, § 688.

Ben C. Cohen and Leo Shapiro, Los Angeles, for appellant.

Alexander Googooian, Deputy Atty. Gen., Robert E. Reed and Russell S. Munro, Sacramento, for Department of Public Works.

SCHOTTKY, Justice pro tem.

Plaintiffs and appellants commenced an action against defendants for damages for the deaths of the occupants of an automobile which, on September 4, 1943, went off the Topanga Canyon Road, also known as State Highway Route 156, in the City of Los Angeles, fell to the bottom of the canyon and burned. The complaint alleged a dangerous, unsafe and defective condition in the highway, consisting of a sharp, unmarked curve without guardrails or warning signals, in what appeared to be a straight and continuous road.

The action was filed in Los Angeles County, and separate answers were filed by the City of Los Angeles and the State of California. Thereafter on motion of defendant State of California it was transferred to Sacramento County for trial, and the following stipulation was entered into between plaintiffs and the State of California:

> "* * * That since said defendant desires to present to the above-entitled court the defendant's contention that the complaint fails to state a cause of action, and since both parties desire to determine said point without inconveniencing a large number of witnesses by preparing at this time for the trial of the entire cause, it may be deemed that the first witness has been sworn and that the said defendant has seasonably objected to the introduction of any testimony whatever on the grounds that the complaint fails to state a cause of action against the defendant State of California, and that thereupon the matter may be argued and submitted to the court."

Pursuant to said stipulation the matter came on for hearing on May 27, 1946, at which time defendant State of California's objection that the second amended complaint failed to state a cause of action against defendant State of California was argued and submitted to the court for decision. On August 27, 1947, judgment was rendered in favor of defendant State of California that plaintiffs take nothing as against said defendant. Plaintiffs thereupon filed an appeal from said judgment.

Thereafter, upon motion of plaintiffs, the cause was transferred to Los Angeles County for trial against defendant City of Los Angeles and a judgment was entered in favor of plaintiffs against said defendant City of Los Angeles, following a jury verdict. Upon appeal this judgment was reversed by the Supreme Court, Gillespie v. City of Los Angeles, 1950, 36 Cal.2d 553, 225 P.2d 522, it being held that the City of Los Angeles had no authority to remedy the dangerous and defective condition and was under no duty to warn of its existence or to request the state to remedy, but that, rather, the State of California, through the Division of Highways of the State Department of Public Works, was alone charged with the duty of properly maintaining the highway.

Following this decision of the Supreme Court, the instant appeal, which, by stipulation, was held in abeyance until complete disposition of Gillespie v. City of Los Angeles, was pursued and appellants contend that "the question is thus squarely presented as to whether Section 688 of the Political Code (now Section 16041 of the Government Code), authorized the maintenance of actions for negligence against the State of California, and whether or not by said section the State of California gave its consent to be sued." Respondent in reply states that that is not the question here presented but rather the question is whether the State of California is liable in tort for negligence which may occur in the discharge of a governmental function.

Section 688 of the Political Code as it read at the time involved in the instant case provided as follows:

> "Any person who has, or shall hereafter have, a claim on express contract or for negligence against the State must present the claim to the State Board of Control in accordance with the provisions of section 667 of this code. Should the claim not be allowed by the State Board of Control, the person having the claim is hereby authorized, subject to the conditions contained in this section, to bring suit against the State on such claim and to prosecute such suit to final judgment."

Appellants cite Welsbach Company v. State of California, 206 Cal. 556, 275 P. 436, which considered the statute which was the forerunner of Political Code section 688, Stats.1893, p. 57, and quote from page 558 of 206 Cal., and page 437 of 275 P., as follows:

> "Prior, also, to 1893, persons having causes of action against the state for injuries arising by reason of the negligence of its officials or employees were not permitted a recovery against the state in the courts, but were relegated to the uncertain mercies of the Legislature for relief. It was doubtless for the purpose of a definite departure from the long-held rule of law that the sovereign could not be made a party to actions of any sort against it without

> its consent, that the Legislature of California, in its wisdom, saw fit to adopt the act of 1893, above referred to. The title of said act, as we have seen, is general and remedial, and indicated the purpose of the Legislature to so far work a departure from the old hard rule of nonliability as to permit those classes of actions to be maintained against the state which are expressly referred to in the section of the act above quoted. When we turn to the body of the act, and of said section thereof, we find that its language is also broadly general and inclusive. It provides that 'all persons who have, or shall hereafter have, claims on contract or for negligence against the state * * * are hereby authorized * * * to bring suit thereon against the state.' It would seem from the foregoing language that it was the intent of the Legislature to embrace within the permissive terms of said statute those two great divisions or forms of actions which are included within the phrases 'ex contractu' and 'ex delicto,' and which embrace, generally speaking, all those forms of actions through which remedies between individuals are sought in courts of justice."

Appellants also cite Berryessa Cattle Co. v. Sunset Pacific Oil Co., 87 F.2d 972, at page 974, in which the Ninth Circuit Court of Appeals, in referring to the Welsbach case, said:

> "The Supreme Court held that the right of recovery in such a case arose from an implied contract to be recovered in an action indebitatus assumpsit and that such an action was expressly authorized by an act of the California Legislature of February 28, 1893 (Cal. St.1893, p. 57). Welsbach Co. v. State of California, 206 Cal. 556, 275 P. 436. This decision, and its companion case, Whyte v. Jordan, 206 Cal. 552, 275 P. 438, was rendered February 26, 1929. The Legislature of the State of California was then in session and immediately passed an act, approved May 27, 1929, repealing the act of February 28, 1893 (Session Laws of Cal.1929, c. 516, p. 890), which had been held to authorize a suit against the state. By the same act it provided for the method of ascertaining and paying claims against the state, adding sections 686 to 692, inclusive, to the Political Code. None of these sections authorizes a claim against the state upon an implied contract. For instance, section 688 authorizes a claim 'on express contract or for negligence,' whereas the Act of February 28, 1893 had authorized a suit on 'claims on contract or for negligence.' It is clear from this legislation that the Legislature intended to withdraw its consent that the state might be sued upon implied contract including a contract for the recovery of taxes erroneously or illegally collected. Section 688 Cal.P.C. was amended in 1931 (Cal.St.1931, p. 849), and again in 1933 (Cal.St.1933, p. 2299), but remained unchanged so far as the question under consideration is concerned."

Appellants argue that the Berryessa case indicates that it was the legislative intent to cut down the waiver of sovereign immunity only in the field of contract, and that the liability of the state for actions based upon negligence remained as announced in the Welsbach case.

Respondent in reply contends that in considering the question of sovereign immunity as it has been established and exists in California, a distinction must be made between the right and the remedy. Respondent states that the sole issue upon this appeal is whether the state is liable in tort for the negligence of its officers, agents, or employees which occurs while the state is acting in a sovereign or governmental capacity, as distinguished from a nonsovereign or proprietary capacity, and that as to this issue, People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1, is controlling and determinative. The court there denied prohibition to enjoin the Superior Court in San Francisco from proceeding in a personal injury case against the state upon the ground that the State Belt Railroad there involved constituted a proprietary rather than a governmental function. The Supreme Court reviewed the earlier cases dealing with the doctrine of sovereign immunity, including those cited by appellants, and said in 29 Cal.2d at page 759, 178 P.2d at page 4:

> "Denning v. State, 1899, 123 Cal. 316, 55 P. 1000, directly involved the question of prospective operation of the act of 1893 on state liability for tort. There an act of negligence by the Board of State Harbor Commissioners occurred after the passage of the act. However, the court did not take note of the problem left open in the prior cases. It merely applied the language of the decisions in Chapman v. State, supra, 104 Cal. 690, 38 P. 457, and Melvin v. State, supra, 121 Cal. 16, 53 P. 416, as holdings that the statute of 1893 (123 Cal. 316, 55 P. 1001) 'did not create any liability or cause of action against the state where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted.' Thus there was adopted in this state the doctrine that state consent to be sued for negligence did not waive sovereign immunity from liability for tort. In the Denning case, however, the question was considered whether in the performance of the plaintiff's duties the state was exercising a business function as distinguished from the discharge of a governmental duty. The court distinguished between governmental and nongovernmental functions of the board, holding that the plaintiff was employed in a distinct branch of the service, viz., the protection against or extinguishment of fires, which even in the case of municipal corporations was uniformly held to be the exercise of a purely governmental function; and that there was just as strong ground for distinguishing between governmental and proprietary functions of the Board of State Harbor Commissioners.
>
> "In Welsbach Co. v. State, 206 Cal. 556, 558, 559, 275 P. 436 (an action for refund of taxes paid under protest), it was held that an action on the implied contract was within the act. The court pointed out that prior to 1893, claimants on contract or for injuries due to negligence of state officials or employees were not permitted a recovery against the state in the courts, but were relegated to the uncertain mercies of the Legislature for relief; and that it was doubtless for the purpose of a definite departure from the long held rule of law that the sovereign could not be made a party to actions of any sort against it without its consent, that the Legislature of California, in its wisdom, saw fit to adopt the act of 1893. However, after the adoption of the consent statute the doctrine of sovereign nonliability for tort has been deemed to apply to state governmental agencies in the discharge of official duties. See, also, Walker v. Department of Public Works, 108 Cal.App. 508, 291 P. 907; Rauschan v. State Comp. Ins. Fund, 80 Cal.App. 754, 253 P. 173; Western Assurance Co. v. Sacramento & S. J. Drainage Dist., 72 Cal.App. 68, 237 P. 59.
>
> "Distinction between governmental operations and those of a proprietary nature was made in The Western Maid, 257 U.S. 419, at page 433, 42 S.Ct. 159, 66 L.Ed. 299, in reference to government liability for negligence committed by a transport vessel. In that case it was said in substance that since the United States had not consented to be sued for torts, it could not be said in a legal sense to have been guilty of a tort. From this statement the conclusion was drawn by text writers that 'If the state or federal government consents to be sued, however, it may be made responsible for torts.' Vol. 9, Law and Contemporary Problems, at p. 188. It has also been said that the state enjoys immunity, not because of any inherent perfection, but rather because of a lack of remedy against it. Vol. 9, Law and Contemporary Problems at p. 219.
>
> "Exponents of the most extreme application of the doctrine of sovereign immunity hold that the language of a statute giving consent to be sued in

contract or tort (although it gives consent to be liable in contract) does not give consent to liability for tort; but that express constitutional or legislative consent must appear before tort liability attaches. This view is expressed in decisions such as Riddoch v. State, 68 Wash. 329, 123 P. 450, 42 L.R.A., N.S., 251, Ann.Cas.1913E, 1033, where it was held that consent by the state to be sued on a claim imposes no new liability and the immunity of the sovereign is a defense which has not been waived. The Washington court stated that if a distinction existed between state governmental functions and acts considered nongovernmental or commercial, the facts (involving an injury to the plaintiff by the falling of a defective rail from a balcony in the state armory rented for the evening for athletic entertainment), did not warrant the distinction favorably to the plaintiff.

* * * * * *

[1] "With the possible exception of Rauschan v. State Comp. Ins. Fund, supra, 80 Cal.App. 754, 253 P. 173, which followed Riddoch v. State, supra, 68 Wash. 329, 123 P. 450, 42 L.R.A., N.S., 251, Ann.Cas.1913E, 1033, the decisions in this state do not foreclose, but seem to favor the proposition that sovereign liability exists for negligence in the state operation of an industrial or business enterprise. Therefore, pursuant to those decisions headed by the case of Green v. State, supra, 73 Cal. 29, 11 P. 602, 14 P. 610, it should be concluded that where the state engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to the consent statute. Insofar as the decision in Rauschan v. State Comp. Ins. Fund, supra, 80 Cal.App. 754, 253 P. 173, is not in harmony with the conclusion herein, it is disapproved."

It is not contended by appellants that in the instant case the maintenance of the highway was a proprietary function and not a sovereign or governmental function. As this court said in Yonker v. City of San Gabriel, 23 Cal.App.2d 556, at pages 558–559, 73 P.2d 623, at page 624: "The management, control, construction, and maintenance of public highways is by all of the authorities which we have examined and to which our attention has been called designated as a governmental function as distinct from any proprietary undertaking or business carried on by a city."

[2] Notwithstanding the earnest and able argument of appellants we must agree with respondent's contention that People v. Superior Court, supra, is determinative of the question involved upon this appeal, and that it is the law of this state that the state is not liable in tort for the negligence of its officers, agents or employees which occurs while the state is acting in a sovereign or governmental capacity.

[3] Appellants contend that the modern trend of judicial interpretation favors imposition upon the state of the same liability and responsibility as is imposed by law upon individual or corporate defendants, and appellants cite numerous cases from other jurisdictions. It would serve no useful purpose to discuss these authorities for we regard the question as settled by the decisions of our courts, and it must remain so until changed by either the Supreme Court or by the legislature. It is apparent that the legislature has at all times been aware of the court's interpretation of the 1893 statute and has moved to correct it when it appeared that the legislative intent was being misconstrued. Hence the 1929 codification as Political Code section 688, following the decision in the Welsbach Company case, withdrew the remedy as to implied contract. In 1941, in Rose v. State of California, 19 Cal.2d 713, 123 P. 2d 505, it was held that section 14, article 1 of the State Constitution was both substantive and remedial though recognizing the right of the legislature to establish procedural requirements for the pursuit of claims in eminent domain, and the legislature then enacted Political Code section 688.1, St.1941, p. 2618, prescribing such procedural requirements. It is significant that the legislature has also con-

sidered and adopted statutes involving the specific waiver of sovereign immunity and acceptance of liability for tort committed in a governmental activity—Vehicle Code section 400, and Government Code section 53051 et seq. It is also significant that it was the 1929 legislature which limited the waiver of immunity from tort liability to the operation of motor vehicles, Civil Code, sec. 1714½, now Veh.Code, sec. 400. It is also worthy of note that Assembly Bill No. 581 was introduced at the 1951 Regular Session of the Legislature for the purpose of effecting a complete waiver of immunity from tort liability, and was never even taken up for consideration in committee.

No other points raised require discussion.

In view of the foregoing the judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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114 Cal.App.2d 713

GOODWIN v. ALSTON et al.

Civ. 4455.

District Court of Appeal,
Fourth District, California.

Dec. 12, 1952.

Rehearing Denied Jan. 9, 1953.

Hearing Denied Feb. 11, 1953.

Action to foreclose trust deeds and crop mortgages. The defendants counterclaimed for treble damages because of alleged usury. The Superior Court of Riverside County, O. K. Morton, J., rendered judgment and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that the counterclaim having been filed more than a year after alleged usurious payment was made, was barred by limitations.

Reversed.

1. Payment 🔑39(9)

Where payments were made without designation by debtor as to how they were to be applied, and creditor allocated a portion of the fund to principal and the balance to interest, trial court could not allocate such portion of the sum to interest. Civ.Code, § 1479.

2. Limitation of Actions 🔑182(1)
Usury 🔑142(2)

Where transaction in which creditor received $51,544.90 in payment of the $40,000 advance that constituted a loan, and creditor received such amount in August and September, 1948, debtors' cross-complaint filed in December, 1949 for treble damages did not state cause of action, in view of provision in Usury Law requiring borrower to commence action for three times the usurious interest paid within a year after such payment, and such objection could be raised at any stage of the proceeding. Gen. Laws, Act 3757, § 3; Code Civ.Proc. § 462.

3. Usury 🔑142(4)

Where issues were whether transactions involving advances of money, notes and deeds of trust and crop mortgages were loans or sales of commercial paper and whether payments to person making advances were usurious, questions designed to develop ownership of land producing potato crops which were source of all payment to person making advances were pertinent and it was error to sustain objections to them. Gen.Laws, Act 3757.

Albert Lee Stephens, Jr., Feinfeld & Feinfeld, and Guy Richards Crump, Los Angeles, for appellant.

Best, Best & Krieger and Arthur L. Littleworth, Riverside, for respondents.

MUSSELL, Justice.

In this action, commenced on October 13, 1949, to foreclose two trust deeds and crop mortgages, defendants M. A. Fleming, Josie Bell Fleming and James M. Fleming filed an answer and cross-complaint in which they claimed treble damages because of alleged usury. This answer and cross-complaint was superseded by an answer and counterclaim in which counterclaim usury was charged and treble damages therefor was sought in the total sum of $82,394.70.

Two transactions were involved. In the first, Goodwin advanced to Fleming $40,000 and in the second $65,000. A jury was empaneled to determine whether these transactions were loans, as claimed by the Flemings, or sales of commercial paper, as claimed by plaintiff Goodwin. The jury rendered verdicts that both transactions were loans. The other issues were tried by the court and a judgment was rendered that plaintiff Goodwin had no right, title or interest in the notes or deeds of trust securing them, or in the crop mortgages executed in connection therewith and that the Flemings were entitled to judgment against Goodwin in the sum of $50,293.62 and costs, amounting to $580. Goodwin, who had advanced $105,000 and had received payments thereon in the sum of $85,639.82 was thereby obligated to pay a judgment in the sum of $50,873 in addition to the loss of the difference between moneys advanced by him and repaid to him in the sum of $19,631.

The evidence is conflicting as to the nature of the transactions involved. Moses A. Fleming, who was an attorney, testified that he had several conversations with plaintiff Goodwin beginning in December, 1947, concerning the advance of money to be made by Goodwin; that in 1947 he told Goodwin that he was growing potatoes and needed money for that purpose; that he had some good security, a $50,000 note, and would put it up to get $40,000; that Goodwin said he would see the property and consider it; that later Goodwin stated he would make the loan if Fleming would give him $10,000 extra, besides the $40,000; that Fleming told Goodwin the loan would be repaid when the potato crop was harvested some time in August; that this arrangement went to escrow and Fleming arranged to pay Goodwin by giving orders on Barney Cornett, a potato grower.

The record shows that the land in Riverside county upon which the potatoes were grown, and to be grown, at this time was owned by Elwood Alston and his wife. The Alstons, on December 12, 1946, had executed a promissory note in favor of M. A. Fleming and James Fleming for the sum of $50,000, secured by a trust deed on the property. The note and trust deed was assigned by Fleming to Goodwin and a crop mortgage executed by the Alstons to Goodwin as additional security for the $50,000 note.

It is admitted that Goodwin received $51,544.90 from the potato broker in payment of the $40,000 advanced.

Fleming further testified that some time in August, 1948, he had another conversation with Goodwin in which he told Goodwin that they (Flemings and Alstons) needed $65,000; that Alston had so many debts they had to have more money; that he, Fleming, told Goodwin he would give him the same security he had already given him in the $40,000 deal and he would give him $20,000 extra on the property; that Goodwin stated he would advance $65,000 to Fleming and would require a crop mortgage for $70,000, in addition to the trust deeds, and potato bonus consisting of the proceeds of 4,000 sacks of number one potatoes; that he told Goodwin he and the Alstons would pay the money back out of the harvest and that it might run over into the next year. A second promissory note for $20,000 was executed by the Alstons, secured by a trust deed and the two trust deeds and a crop mortgage for $70,000 were executed by the Alstons to Flemings and by the Flemings assigned to Goodwin. The $65,000 was advanced by Goodwin and Goodwin thereafter received through the potato broker, in March–April, 1949, $34,094.92, which sum included a potato bonus of $15,958.

The record shows that the Alstons conveyed a one-half interest in the real property on which the potatoes were grown to Fleming on September 9, 1948, and the remaining one-half on February 26, 1949, and that all the moneys received by Goodwin in both of the transactions involved were through the potato broker on orders drawn upon him. The Flemings did not sign any written document agreeing to repay Goodwin the sums advanced by him.

Goodwin's testimony concerning these two transactions was that in December, 1947, he had a conversation with Fleming in which Fleming stated that he had a trust deed on a ranch near Perris on which he was growing potatoes; that he wanted to sell the trust deed and was expecting to discount the note and trust deed; that he, Goodwin, stated he wanted to look at the ranch; that he went to see it and was shown the records of the profits therefrom; that he wanted to be sure the crop would pay off the trust deed before he bought it; that a twenty percent discount was agreed upon and the parties went into escrow; that he deposited the sum of $40,000 and received a $50,000 trust deed and note signed by Mr. and Mrs. Alston, endorsed by the Flemings and received a crop mortgage on the crop that was either planted or about to be planted, and also received an order signed by Alstons to the potato broker to pay the amount of the note; that he did not lend any money to Fleming but purchased a trust deed and note on which he subsequently received the sum of $51,544.90; that early in September, 1948, Fleming told him that Alston owed him a lot of money; that he needed some cash; that when the original trust deed and note was reassigned to him, he was going to sell it and he was also getting an additional $20,000 trust deed and note; that he asked Goodwin if he would be interested in buying them and stated he would give the same discount as on the $50,000 note and trust deed executed in March; that Alston was going to farm more land and that the report from the broker was that potatoes were going to be high and Alston would easily be able to pay the $70,000 with the crop that was going on in September; that he, Goodwin, advanced $65,000 to Fleming and received the $50,000 trust deed and note, the $20,000 trust deed and note and the crop mortgage for $70,000; that at the time the second transaction was consummated, Goodwin agreed to purchase 4,000 sacks of potatoes at $2.50 a sack, so that he, Goodwin, paid $55,000 for the trust deeds and paid $10,000 for the potatoes; that subsequent to this second transaction he received through the potato broker $15,958 for the potatoes and the further sum of $8,174.92 in March, 1949, and $9,962 in April.

The judgment of the trial court was computed as follows:

"Computation of Judgment

Goodwin owes Fleming on counterclaim:		
Treble interest paid on first loan	$34,634.70	
Treble potato bonus on second loan	$47,874.00	
Treble interest and cash bonus paid on second loan	$21,972.00	
		$104,830.70
Fleming owes Goodwin on second loan the sum of $65,000.00 reduced by		
being the amount already credited and paid	$10,812.92	
	$54,187.08	$ 54,187.08
Balance due from Goodwin to Fleming		$ 50,293.62"

[1] The trial court in arriving at the amount set forth in the last item in the computation ($21,972) applied the two payments made in March and April amounting to $18,136.92, as follows: $10,812.92 on the principal of the $65,000 obligation, and the balance of the payment in the amount of $7,324 to the $5,000 cash bonus and accrued interest of $2,324 on the $70,000 to the date of payment. The $7,324 payment, when trebled, equals $21,972. Appellant Goodwin rightly contends that the court erred in not properly allocating payments between interest and principal. On May 5, 1949, in a statement in writing rendered to Fleming, Goodwin allocated $17,463.59 to principal and the balance to interest (plaintiff's exhibit 8).

Section 1479 of the Civil Code provides as follows:

> "(*Application of general performance.*) Where a debtor under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:
>
> "One. (*Application by debtor.*) If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.
>
> "Two. (*Application by creditor.*) If no such application be then made,

> the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of (the) debtor.
>
> "Three. (*Application in absence of designation.*) If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:
>
> "1. Of interest due at the time of the performance.
>
> "2. Of principal due at that time.
>
> "3. Of the obligation earliest in date of maturity.
>
> "4. Of an obligation not secured by a lien or collateral undertaking.
>
> "5. Of an obligation secured by a lien or collateral undertaking."

The record shows that the payments totaling $18,136.92 were made without designation by Fleming or Alstons as to how they were to be applied, and since Goodwin allocated $17,463.59 of that sum to principal, the court had no authority to allocate such sum to interest. The evidence shows that the check to Goodwin for $15,920 was issued without instructions as to its allocation. The endorsement thereon by Goodwin "Payment account Alston-Fleming ranch for 4,000 sx potatoes as per assignment" does not indicate that Goodwin was accepting this money as interest and indicates that he was applying it to the transaction in which he purchased the potatoes.

[2] Appellant argues that "since the payments made to plaintiff in connection with the first transaction were made in August and September, 1948, and the answer and cross-complaint was not filed until December, 1949, treble damages cannot be recovered based upon such payment." Appellant states that only one "loan" was originally contemplated; that only one "loan" was originally made, this being the loan of $40,000 made on or about March 8, 1949; that not until five months later was there any discussion with respect to a further loan; that the first loan of $40,000 was repaid in two installments, the sum of $25,000 on or about August 16, 1948, and the further sum of $26,544.90 on or about September 11, 1948; that the second and last payment on the original loan was made contemporaneously with the making of the second loan for $65,000. These statements are borne out by the record. In this connection it should be noted that the $40,000 advance was treated as one transaction in the interrogatories submitted to the jury and the $65,000 advance as another, and that the jury by its verdict found that each of these transactions constituted a loan.

The first paragraph of section 3 of Act 3757, Usury Law, Deering's General Laws of 1944, page 1350, provides as follows:

> "Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or by his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery."

In Kurzman v. Commercial Credit Co., D.C., 33 F.2d 358, 359, the court, in construing this statute, said:

> "The usury law is a special law, conferring a special right of action to recover interest unknown to the com-

> mon law. The statutory period within which such action may be brought is not, strictly speaking, a statute of limitations. It is rather a statute of creation, which brings the right of action into life for a certain period, and extinguishes it absolutely at the expiration of that period. Such a statute is not affected by the general rules as to the tolling of the statute of limitations, and failure to discover the usury cannot prolong the life of the cause of action created and given one year's life by the statute. 37 Cyc. 686; Partee v. St. Louis & S. F. R. Co., 8 Cir., 204 F. 970, 51 L.R.A.,N.S., 721."

Respondents contend that appellant waived the statute of limitations as to the counterclaim by failing to invoke it at the time of trial, and that he cannot invoke it for the first time on appeal. Citing Union Sugar Co. v. Hollister Estate Co., 3 Cal. 2d 740, 47 P.2d 273. That case does not involve the construction of the usury statute and it is there stated that where the answer to a complaint sets up any matter constituting an affirmative cause of action or counterclaim, such new matter is deemed controverted under the provisions of section 462 of the Code of Civil Procedure, and the adverse party may, without formal plea, show that the attempted defense is barred by the statute of limitations, and that the statute is deemed pleaded by operation of law.

In Stock v. Meek, 35 Cal.2d 809, 816–817, 221 P.2d 15, 20, the court, in interpreting the one year limitation of the Usury Law, supra, said:

> "The Usury Law provides that any person who pays interest at a usurious rate may recover treble the amount paid, 'providing such action shall be brought within one year after such payment or delivery.' Section 3. It is settled that this section did not abrogate any common law rights of borrowers as parties to an illegal contract, but merely added a statutory remedy to aid the borrower and penalize the lender. Westman v. Dye, 214 Cal. 28, 4 P.2d 134; Taylor v. Budd, 217 Cal. 262, 18 P.2d 333. Borrowers may therefore bring an action for money had and received to recover usurious interest paid within two years of the suit. Babcock v. Olhasso, 109 Cal.App. 534, 293 P. 141; Code Civ.Proc., § 339(1). Since the overpayment occurred on January 12, 1946, and the complaint was filed March 26, 1947, defendants are not barred from setting up a counterclaim to recover the interest. Jones v. Mortimer, 28 Cal.2d 627, 633, 170 P.2d 893."

Under the rule stated in this case, a borrower may bring an action for usurious interest paid within two years of the suit. However, such borrower cannot claim three times the usurious interest paid unless an action therefor is commenced within a year after such payment. In the instant case Goodwin received $51,544.90 in payment of the $40,000 advanced. The trial court trebled the difference between these two amounts ($11,544.90) and charged Goodwin with the sum of $34,634.70. This was clearly error. No cause of action existed for the recovery of three times the usurious interest at the time the counterclaim was filed. Under such circumstances, the counterclaim fails to state a cause of action for the recovery of treble damages and this objection may be raised at any state of the proceeding. Section 3 of the Usury Act, supra, creates a right of action for a limited period and extinguishes it at the end of that period. The Flemings had no right of action for treble damages at the time of the filing of the answer and consequently, no counterclaim for treble damages. In this connection the record shows that all moneys received by Goodwin were from the sale of potatoes and not from the personal funds of the Flemings. While the jury found that the transactions involved were "loans", it does not appear from those findings whether the loans were to the Flemings or to the Alstons. It is significant that no note or written promise to pay Goodwin was executed by Flemings and it was understood that plaintiff would be repaid from the proceeds of potato crops.

[3] Appellant next contends that the trial court erred in sustaining objections to certain questions asked on cross-examination of Fleming. The questions, answers and rulings thereon are set forth in the following testimony:

"Q. What interest did you have with Mr. Alston on that ranch?

"(Objection by counsel, Mr. Krieger.)

"The Court: I think your question asked not whether he borrowed the money with Mr. Alston or from Mr. Alston, but what the working arrangement was on the ranch. I don't think that is material.

"Q. Did you loan money to Mr. Alston?

"Mr. Krieger: I object to that as being incompetent, irrelevant and immaterial, and outside the issues.

"The Court: Sustained."

"Q. You just testified that you stated to Mr. Goodwin that 'we', that means you and Alston paid for the land $600.00 an acre. A. Yes, I furnishing the money.

"Q. When did you buy the land? A. Well, sometime prior to that. I don't exactly remember.

"Q. Did you and Alston buy it together?

"Mr. Krieger: I object to that. Now we are getting far afield again.

"The Court: Sustained. It is already asked and answered.

Q. Did you buy it at the same time Alston bought it?

"Mr. Krieger: I object again. I object to it as incompetent, irrelevant and immaterial.

"The Court: Sustained."

"Q. What connection did Mr. Cornett have with that ranch at that time, if you know?

"Mr. Krieger: Objected to as incompetent, irrelevant and immaterial.

"The Court: Sustained."

"Q. Did you own all the potatoes that was going to come from that farm?

"Mr. Krieger: Objected to as calling for a conclusion of the witness, and also not the best evidence for the reason that the order on the potatoes was drawn by Mr. Alston and that order is the best evidence.

"Mr. Feinfeld: I am asking if he owned all the potatoes.

"The Court: Overruled. You may answer. Read the question. (Question read.)

"The Court: You may answer. A. I did not.

"Q. How much did you own?

"Mr. Krieger: I object to that as being incompetent, irrelevant and immaterial.

"The Court: Sustained."

These questions were designed to develop the extent, if any, of the Flemings' interest in the real property owned of record by the Alstons and the Flemings' interest, if any, in the potato crops which were the source of all payments to plaintiff. These questions were pertinent to the issues involved and submitted to the jury and it was error to sustain objections to them.

An application to produce evidence here was filed by the appellant in which he sets forth portions of the deposition and the testimony taken February 15, 1952, both in the case of Pacific Guano Company v. Elwood Alston, M. A. Fleming, et al., in the Superior Court of Riverside County. It is claimed therein that the evidence sought to be introduced shows that M. A. Fleming did not, himself, borrow money from appellant Goodwin but furnished collateral security for a loan to Alston; that all the moneys paid to appellant were proceeds of a crop which was owned by Alston and not respondents and that respondent Fleming's testimony at the trial was in some respects false. Objections were filed by respondents to production of this evidence and since we conclude that the judgment must be reversed by reason of the errors of the trial court hereinbefore noted, it is not necessary to pass upon the application. The affidavit in support of the application does, however, demonstrate the seriousness of the error of the trial court in refusing to permit the witness Fleming to answer the quoted questions on cross-examination.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

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114 Cal.App.2d 488

ROLLINS v. HEDIN et al.

Civ. 15078.

District Court of Appeal, First District,
Division 2, California.
Dec. 1, 1952.

Action for injuries allegedly incurred by reason of attack upon plaintiff by defendants' dog. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Dooling, J., held that where defendants violated ordinance which provided that it shall be unlawful for owner of dog to allow dog to remain upon public streets or place in city without being securely fastened or held by leash, etc., and violation of ordinance in allowing dog to run at large proximately caused plaintiff's injuries, plaintiff was entitled to recover.

Affirmed.

1. Appeal and Error 🔑197(3)

In action for injuries allegedly incurred by reason of attack upon plaintiff by defendants' dog, where defendants did not object to introduction of dog "leash ordinance" defendants could not contend for first time on appeal that complaint was not based on violation of ordinance.

2. Animals 🔑74(5)

In action for injuries allegedly incurred by reason of attack upon plaintiff by defendants' dog, evidence was sufficient to support finding of trial court that one of the defendants knew of vicious propensities of dog.

3. Animals 🔑53

Where defendants' violation of "leash ordinance" in allowing dog to run at large proximately caused plaintiff's injury, plaintiff was entitled to recover for injuries caused by dog.

4. Stipulations 🔑14(9)

Where bills for medical expenses were admitted pursuant to stipulation that all of the bills had been paid as indicated on the face of them, defendants were foreclosed from contending that the reasonableness of the charges were not proved.

5. Appeal and Error 🔑1050(1)
Damages 🔑130(2)

In action for injuries caused by dog to elbow and knee of plaintiff which injuries necessitated operations, evidence was sufficient to support award of $100 general damages, and admission of hearsay evidence as to what plaintiff's doctors told him concerning his injuries was not prejudicial error.

◆

E. C. Mahoney, Burlingame, for appellants.

Saul N. Ross, San Bruno, for respondent.

DOOLING, Justice.

Defendants, husband and wife, appeal from a judgment rendered by the court in a trial without a jury for personal injuries incurred by plaintiff in an encounter with a dog owned by defendants. The complaint charged that the dog was "of a ferocious, vicious and mischievous disposition and accustomed to attack persons and possessed of traits making said dog dangerous to persons, all of which was known to said defendants." The plaintiff's proof showed that while he was walking along the sidewalk in front of defendants' residence in the City of San Bruno the dog approached him from behind, seized his trouser leg and twisted around in front of him throwing him violently to the sidewalk. He received injuries to an elbow and knee necessitating hospitalization for 12 days and surgery on both elbow and knee.

At the close of plaintiff's case the transcript shows the following proceedings:

> "Mr. Ross: * * * If the Court please, at this time I would like to offer in evidence a certified copy of the City Ordinance of San Bruno, City Ordinance No. 298, known as health and safety ordinance No. 20.
>
> "The Court: You can read it later, if you want. It will be admitted.
>
> * * * * * *
>
> "Mr. Ross: * * * (reading)
>
> " 'Section 3. It shall be unlawful for the owner or person having possession of or in charge of any dog or dogs to allow the same to be or remain upon any public street or place in said city without being securely fastened or held by a leash, chain, or rope or cord and led or held by some person or otherwise securely fastened or held.' "

[1] The record shows that this ordinance was introduced and section 3 thereof read without any objection. Appellants baldly state that "(d)efendants were then precluded from objecting to the introduction of the ordinance." The record does not bear this out. In the absence of any objection to the introduction of the ordinance it is not open to appellants to argue for the first time on appeal that the complaint was not based on a violation of the ordinance. "It is unfair for a party to withhold an objection to a pleading founded upon a defect, which if pointed out in time might have been remedied by amendment, thereby inducing his opponent to rely upon his pleading as sufficient, until it is too late to correct the defect, in order that he may have the advantage of the fatal defect upon appeal." Viglione v. City and County of San Francisco, 109 Cal.App.2d 158, 160, 240 P.2d 68, 69. "Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings." Poledori v. Newman, 116 Cal. 375, 378, 48 P. 325, 326; Colbert v. Colbert, 28 Cal.2d 276, 281, 169 P.2d 633.

[2, 3] There was evidence of an admission by appellant husband that he knew the trait of the dog: "He said * * * he had done them things before, he had run after people * * * he had never caused any of them to hurt themselves * * * I guess I should get rid of the dog because he has done these things before." While this evidence was contradicted it is sufficient to support the trial court's conclusion of knowledge by appellant husband of the danger of permitting the dog to run at large. There is no evidence of such knowledge by appellant wife, but the court found the violation of the ordinance and proximate injury to respondent. A "leash ordinance" such as here involved is designed for the protection of the public from dogs running at large and where its violation proximately causes injury to a plaintiff he may recover therefor against the owner. Brotemarkle v. Snyder, 99 Cal.App.2d 388, 221 P.2d 992.

[4] The court allowed $720.63 for medical expenses, $450 for loss of earnings and $100 general damages. The bills for medical expenses were admitted pursuant to the following stipulation:

> "Mr. Ross: Mr. Mahoney, will you stipulate as to these various bills, all of which have been paid, as indicated on the face of them?
>
> "Mr. Mahoney: Yes."

In the face of this stipulation appellants are now foreclosed from arguing that the reasonableness of the charges was not proved.

The loss of earnings was established by respondent's testimony that he earned $75 per week, was not able to go back to work after he left the hospital and "was out of work about six weeks."

[5] Some hearsay evidence of what his doctors told respondent concerning his injuries was admitted over objection. This

caused appellants no prejudice since the award for general damages was only $100 and this is amply supported by the evidence properly admitted.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

114 Cal.App.2d 587

LOGAN v. FORSTER et al.

Civ. 19002.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1952.

Rehearing Denied Dec. 23, 1952.

Hearing Denied Feb. 2, 1953.

Husband's action against executrices of his late wife's estate, wherein issue was raised as to existence of community property. The Superior Court, Los Angeles County, Otto J. Emme, J., rendered judgment adverse to the husband, and he appealed. The District Court of Appeal, Fox, J., held that there was ample evidence to support the essential findings on which the judgment was based.

Affirmed.

1. Divorce 🔑322

Where divorce decree did not purport to determine or adjudicate interests of spouses in property, question was open for adjudication in proper forum.

2. Husband and Wife 🔑280

Unchallenged property settlement agreement in which husband relinquished any interest he might have in property was determinative of question of whether there was community property belonging to spouses at time of Mexican divorce decree, even though such decree did not purport to determine or adjudicate interests of spouses in property. Civ.Code, §§ 159, 162.

3. Appeal and Error 🔑1010(1)

Trial 🔑136(4)

Where meaning of statutory law of foreign country is in controversy and its elucidation requires expert testimony, resolution of such conflict as to meaning and effect of foreign law remains question to be determined by trier of facts, and such determination, if supported by substantial evidence, will not be disturbed on appeal.

4. Evidence 🔑601(1)

Evidence sustained finding that failure to record marriage in civil register of marriages in Mexico, as required by Mexican Civil Code provisions relating to marriages of Mexican citizen to foreigner, obviated need for applying Mexican system of community or conjugal partnership property to subsequent accumulations and acquisitions of spouses.

5. Appeal and Error 🔑931(3)

Where omitted finding must be inferred from a consideration of findings actually made, appellate court will recognize necessary inference and consider finding in question as having in effect been made.

6. Appeal and Error 🔑1071(6)

Plaintiff could not successfully complain of court's failure to find on issue when in light of evidence and reasonable inferences therefrom, facts actually found, and judgment ordered, such finding would have been adverse to him.

7. Husband and Wife 🔑273(1)

Statute providing that upon death of either husband or wife one-half of all personal property, wherever situated, "heretofore or hereafter" acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been separate property of either if acquired while domiciled in California, shall belong to surviving spouse, does not purport to affect vested property rights in marital property owned by husband and wife brought into state concomitant with change of domicile to California, but is rather a succession statute, speaking as of time of death, and governing rights of testamentary disposition and succession, enacted under state's power to regulate descent of, or succession to, property within its borders. Probate Code, § 201.5.

8. Contracts 🔑139

Even if property settlement agreement was unenforceable as against public policy and as an invalid attempt to alter normal incidents of marriage, husband, who had by his acts and conduct permitted title to property in dispute to vest in his wife by his observance of contract, and who was in pari delicto in alleged illegality by his complete acquiescence in its full execution, could not receive aid of courts in recovering property relinquished to wife under contract.

9. Contracts ⚷138(1)

Ordinarily parties to contract, void because contrary to public policy, will be left where they are when they come to court for relief.

10. Husband and Wife ⚷257, 259

It is general rule that rents, issues and profits obtained from separate property of one spouse are invested with same character as producing property, but where such property is business whose continued success and lucrativeness after marriage depends on contribution of toil and talents of husband or wife, then that portion of increment, profits, or returns attributable to his or her labor is normally community property.

11. Husband and Wife ⚷257

Where wife owns business enterprise at time of her marriage, which she continues to operate thereafter, question of what portion of profits and enhancement in value of business is to be allocated to personal ability, initiative and industry of wife and classed as community property is question of fact turning on circumstances of individual case.

12. Husband and Wife ⚷264

Evidence sustained trial court's finding that deceased wife's participation in business owned by her at time of marriage had not been responsible for its success, its increased value or its profits, and that dividends received by her had been a reasonable return on her investment.

13. Husband and Wife ⚷262(1)

The law presumes that money used in maintenance of family is drawn from community funds before there is encroachment on separate property.

14. Husband and Wife ⚷264

Evidence sustained trial court's determination that all salaries received by deceased wife for her services to firm owned by her at time of marriage had been disbursed to meet living expenses.

15. Evidence ⚷271(18)

On issue as to existence of community property, it was error to admit will in which deceased wife declared that all property she possessed was separate property.

16. Appeal and Error ⚷1050(1), 1071(5)

In husband's action involving issue as to existence of community property, any error in admitting will in which deceased wife declared that all property she possessed was separate property was not prejudicial, in view of other decisive evidence on point; and likewise incorporation of such declaration in findings was not prejudicial, where judgment did not rest upon that particular finding for its validity.

17. Appeal and Error ⚷931(7)

If one finding, sustained by sufficient evidence, will support trial court's judgment, an appellate court will presume that judgment was predicated on such finding, and questions relative to other findings become immaterial upon appeal and may be disregarded.

◆

B. R. Ware, Los Angeles, for appellant.

Alfred S. Chapman and Wallace & Cashin, Los Angeles, for respondents.

FOX, Justice.

Plaintiff filed this action against the executrices of his late wife's estate alleging that one half of all the properties comprising the estate belonged to him as his share of the community property. The total appraised value of the estate was $364,382.54. Plaintiff appeals from the judgment that there was no community property.

Plaintiff and the decedent were twice married and lived together more than 20 years. The first marriage took place in Ventura County on December 8, 1923, at which time Mrs. Logan was a widow about

51 years of age and plaintiff was her junior by 19 years. She had inherited from A. J. Flores, her first husband, and at the time of her marriage to plaintiff was the owner of all the stock in a Mexican corporation which owned and operated a power and light business located in Mexicali, Baja California, Mexico. On the date of the marriage plaintiff was employed at a bank and earned a salary of $135 a month, while his wife's income from her stock ownership in the utility company was approximately $3,000 per month. Mrs. Logan also owned a house in Los Angeles which she had inherited from Mr. Flores and in which she was residing when she died. At the time of her death she also owned or had an interest in certain real property in Los Angeles County, all of which she had inherited from her mother with the exception of property located in South Pasadena, which she purchased during her marriage and which was conveyed to her by an instrument describing her as a married woman.

Prior to Mrs. Logan's first marriage in 1923, the Mexican utility company had been small, not too efficiently operated, and plagued by a degree of corrupt practices, waste and incompetence by certain of its employees. In 1921 Mrs. Logan employed her nephew, Mr. Chapman, and sent him to Mexicali to rectify these conditions. In subsequent years, with the installation of an improved organization under the direction of Mr. Chapman, who became manager and treasurer of the company, coupled with the growth and expansion of the city of Mexicali, the company began to prosper through the increased sale of electricity. In 1924 plaintiff and Mrs. Logan interrupted their European honeymoon to return to Mexico in order to obtain a new franchise after the old one had been cancelled. In March 1925, Mr. Chapman resigned as manager of the utility company, after the company had shown a net profit of over $140,000 in the last three years of his tenure, whereupon Mrs. Logan became president, general manager and treasurer of the company. She retained those offices until the assets of the business were sold in 1943.

In 1925 Mrs. Logan purchased a residence in Mexicali and thereafter, until the sale of her business, resided there about eight months of each year, spending the summer months annually in her Los Angeles home. During the 20 years following Mr. Chapman's resignation the utility company was put in charge, successively, of three Mexican managers, who handled the entire business operation. Plaintiff testified that these managers and Mrs. Logan's Mexican attorney, Mr. Barcenas, were in frequent telephonic communication with Mrs. Logan, held conferences with her from time to time about business transactions, and visited her house several times weekly as dinner guests where company affairs were discussed. Plaintiff further testified that Mrs. Logan was furnished daily reports concerning collections, disbursements and bank deposits. Mrs. Logan received no specified salary but made periodic withdrawals between 1937 and 1944 totaling $40,697 which were attributed to salary and reported as such to the Mexicali office of the Baja California Treasury Department.

The record is replete with oral and documentary testimony regarding the financial history and vicissitudes of the utility company. By 1928 the entire plant and operating system had been rebuilt, part of it with funds advanced by Mrs. Logan. In 1927, in addition to the 100 shares outstanding, 900 more shares were issued to Mrs. Logan, adding 450,000 pesos in capitalization. At that time, 300,000 pesos were charged to surplus and 50,000 pesos to the new franchise, while the remaining 100,000 pesos were charged to surplus in 1940. During the period 1932 to 1935, and again in 1938, the business operated at a loss. Between 1937 and the ultimate sale of the business in 1943 the financial statements of the company indicate a steady increase in the value of the physical plant largely due to a reinvestment in capital equipment of about 180,000 pesos. Between 1937 (the date of the second marriage) and 1944 Mrs. Logan received as dividends and salaries from the business about $88,000, of which $47,808 was denominated dividends and $40,697 as salary.

In 1929 Mrs. Logan became a Mexican citizen, and retained her Mexican nationality until she died. Plaintiff testified that her naturalization was undertaken on the advice of Mr. Barcenas, to avoid the impact of laws restricting the ownership of Mexican land by aliens and requiring governmental approval for the operation of a domestic industry by foreigners. Plaintiff testified that Mr. Barcenas counseled that Mrs. Logan should keep her own property in her separate name and should not engage any foreigners as employees or directors of her company. The record shows clearly that Mr. Logan, who is an American citizen, was never officially connected with the company nor did he ever receive any salary from it and that the Logans at all times scrupulously kept their properties separate and apart. However, plaintiff testified that he assisted his wife in many ways in connection with the business operations, such as checking reports, participating in business conferences, and making purchases of materials, as well as representing her interests during a period of political turmoil and labor unrest.

In 1934 Mr. and Mrs. Logan parted after a period of domestic infelicities during which time Mrs. Logan commenced an action for divorce in Los Angeles County, which was later dismissed because she was not a resident there. On November 26, 1934, a separation agreement was executed between the parties, in which the salient terms provided that: (1) All property of every kind standing in the name of either party and all property subsequently to be acquired was to be the separate property of such party; (2) Mrs. Logan was to pay $10,000 to plaintiff in settlement of all claims, including any for services and in lieu of support of plaintiff for the rest of his life; (3) there never had been any community property belonging to the parties and all property held by Mrs. Logan and its increments were her separate estate; (4) the parties waived alimony, court costs and counsel fees and right to support in any pending or future action; (5) plaintiff was to leave the house in which he resided with Mrs. Logan and the parties would henceforth live apart. On the date of the execution of their agreement Mrs. Logan paid Mr. Logan the $10,000 and he executed a grant deed conveying to Mrs. Logan title to all real and personal property standing in her name or possessed by her both in California and Mexico.

On September 9, 1935, Mrs. Logan procured a default divorce in Nogales, State of Sonora, Mexico, on the grounds of cruelty. The husband failed to appear, having been served by publication. Although the complaint contained an allegation that there was no community property, the prayer asked only for dissolution of the marriage and restoration of her maiden name and the decree of divorce made no adjudication of property rights. Mr. Logan testified that he had no knowledge of the pendency of the divorce action, and learned of the divorce for the first time in November of 1937, when Mrs. Logan asked him to accompany her to Mexico City to obtain an increase in utility rates. On their way to Mexico City they remarried, on November 20, 1937, in El Paso, Texas. This marriage was not recorded in Mexico. Mr. Leonardo Sosa, an attorney, called as an expert on Mexican law, testified that where a marriage of a Mexican citizen and a foreigner was not registered the Mexican system of community property would not operate, so that the separate property of each remained separate, and profits and rents from property owned by one spouse, as well as income earned by a spouse, remained separate property. Immediately following the marriage, the spouses returned to Mexicali where they made their permanent residence until 1943.

At the time of the second marriage Mrs. Logan was about 68 years old, and by 1943 was in poor health and a partial invalid. Throughout the course of the second marriage the spouses continued to keep their respective properties separate and there was a meticulous effort made to avoid any commingling of funds. Mrs. Logan maintained her own bank account free of any intervention or control on plaintiff's part. She paid out of funds under her control the entire expense of the upkeep of the homes in Mexicali and Los Angeles. Whenever plaintiff made any expenditures for Mrs. Logan or for household expenses, he presented bills or receipts to Mrs. Logan and was reimbursed. Plaintiff even filed a claim against Mrs. Logan's estate for reimbursement for the payment of certain of her debts. The expenses of trips together, the entertainment of friends, and theatre or dinner parties, were borne by Mrs. Logan. Plaintiff appears not to have had any independent occupation of his own, except for the intermittent receipt of commissions on real estate sales. He had a small amount of real property which he handled himself and a bank account to which Mrs. Logan had no access. He testified that he kept his affairs separate from that of his wife.

Plaintiff and Mrs. Logan filed separate income tax returns. The managers of the utility company were under instructions to take no orders or directions from Mr. Logan in matters concerning the conduct of the business.

In 1943 the utility company sold its physical assets for $187,588.18, which price included the electrical system, real estate in Mexicali, a substation in Calexico, and supplies on hand. The proceeds of this sale, together with other funds of the company, were subsequently deposited in a bank account in Mrs. Logan's name in Calexico, California. In February, 1945, this account totaled approximately $224,000 and is the major asset in Mrs. Logan's estate. Following the sale of the business, Mrs. Logan and plaintiff moved to California where they resided up to the time of Mrs. Logan's death.

The record presents no clear-cut picture as to the exact amount disbursed by Mrs. Logan for living expenses, although it suggests that before 1944 Mrs. Logan traveled considerably between Mexico and the United States, maintained two homes, and enjoyed a generous scale of living. Between 1944 and her death in 1949 she withdrew from a bank account $60,125 to meet her needs, but an unascertained part of this was devoted to gifts to charities and relatives. However, at least $500 per month was definitely applied to living expenses, and plaintiff, in conformity with the practice of Mrs. Logan's unquestioned management and use of property standing in her name, made no objection to Mrs. Logan's disposition of the money. Mrs. Logan died in May, 1949, leaving an estate consisting of four bank accounts aggregating $257,609.49, the sum of $1,250 in traveler's checks, the real property previously described appraised at $40,000, stock in both the Security-First National Bank and Bank of America valued at $46,194.05, jewelry worth $13,029, and a promissory note, an automobile, and furniture collectively worth about $5,500. It may be noted that when the second marriage occurred Mrs. Logan owned virtually all of the real property, the jewelry, the household furniture, the utility company stock and all the bank stock except the Bank of America stock appraised at $5,009.05. These securities and the other items were acquired by Mrs. Logan from funds in her possession, ownership and control. In a holographic will dated November 22, 1946, Mrs. Logan declared all this property to be part of her separate estate, devising and bequeathing it to her nieces and nephews, with no provision made for plaintiff. That will, and two earlier witnessed wills, one executed in 1925 and the other undated but revoked in 1934, were received in evidence over plaintiff's objection.

[1, 2] In reaching its conclusion that no part of the property included in decedent's estate could be attributed to the community, the court made extremely detailed, extensive, often confusing and occasionally ambiguous findings of fact. Since plaintiff's principal attack on the judgment is predicated on his contention that certain of these findings are unsupported by the evidence and contrary to law, we will consider them first. Plaintiff asserts that the court's determination that there was no community property belonging to the spouses at the time of the Mexican divorce is based on the court's erroneous interpretation of the effect of the Mexican decree, and its adoption of such decree as an adjudication of the property rights of the parties. However, an examination of all the findings shows that the court did not rely on the Mexican decree, since this did not purport to determine or adjudicate the interests of the spouses in the property. This question was open for adjudication in the proper forum, DeYoung v. DeYoung, 27 Cal.2d 521, 165

P.2d 457, and the court in the case at bar made its own finding "that there were no properties or goods belonging to said parties which could be considered belonging to the marriage state at that time," which was the time of the divorce. This independent determination of the court below is plainly based on the property settlement agreement executed by the parties in November, 1934, in contemplation of their separation, and which was valid and subsisting at the time of the divorce ten months later. Civ.Code, sec. 159; Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265. Plaintiff did not challenge the agreement, leaving the court free to determine, as it did, that it was a complete and valid settlement of the property rights of the parties at the time of the divorce. There is thus no question that all the property owned by Mrs. Logan at the time of her remarriage to plaintiff was her separate property, Civ.Code, sec. 162, since plaintiff, by virtue of the property settlement agreement, had relinquished to her any interest therein which he might have had.

[3, 4] Plaintiff attacks the finding of the court that the failure of the parties to record their second marriage in the civil register of marriages in Mexico, as required by the Mexican civil code relating to marriages of a Mexican citizen to a foreigner, obviated the need for applying the Mexican system of community or conjugal partnership property to the subsequent accumulations and acquisitions of the spouses. This finding was based on expert testimony as to the import and effect of the law of Mexico and as such was a question of fact for the trial court. Wickersham v. Johnson, 104 Cal. 407, 38 P. 89. Where the meaning of the statutory law of a foreign country is in controversy and its elucidation requires expert testimony, the resolution of such conflict as to the meaning and effect of the foreign law remains a question to be determined by the trier of the facts, Hawi Mill & Plantation Co. Ltd. v. Finn, 82 Cal.App. 255, 263–264, 255 P. 543, and such determination, if supported by substantial evidence, will not be disturbed on appeal. In re Estate of Johnson, 100 Cal. App.2d 73, 80, 223 P.2d 105. The testimony of Mr. Sosa provides ample support for the court's finding that under the law of Mexico plaintiff's separate property at the time of her remarriage in 1937 and all property which she subsequently acquired was her separate property.

[5, 6] Plaintiff further argues that the law of Mexico is inapplicable since he was a California domiciliary during the time of the second marriage when such property was acquired and the law of the husband's domicile at the time of acquisition determines the status of personalty as being separate or community property. While the court made no express finding as to the matrimonial domicile, it is apparent from an analysis of all the findings that the court proceeded on the assumption that plaintiff went to Mexicali for the purpose of establishing his home for an indefinite period at the site of his wife's business, which was also the locus where the spouses actually resided for the next several years, and such a finding with respect to plaintiff's domicile is necessarily implied by the findings made. Shepard v. Yale, 94 Cal.App. 104, 107–108, 270 P. 742; Wolvin v. First Methodist Episcopal Church, 111 Cal.App. 643, 295 P. 1085. "Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made (citing cases)." Schultz v. Los Angeles Dons, Inc., 107 Cal. App.2d 718, 725, 238 P.2d 73, 77. Plaintiff cannot successfully complain of the court's failure to find on this issue when, in the light of the evidence and the reasonable inferences therefrom, the facts actually found and the judgment ordered, the finding would have been adverse to him. Walpole v. Prefab Mfg. Co., 103 Cal.App.2d 472, 481, 230 P.2d 36.

[7] It is thus clear that plaintiff's interest, if any, in Mrs. Logan's estate, which the court properly found to be her separate property at the time the parties became domiciled in California in 1943, must derive from the operation of section 201.5 of the Probate Code, which provides in part: "Upon the death of either husband or wife one-half of all personal property, where-ever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, shall belong to the surviving spouse; * * *." It may be remarked that this statute does not purport to affect vested property rights in marital property owned by a husband and wife brought into this state concomitant with a change of domicile to California. Estate of Miller, 31 Cal.2d 191, 196, 187 P.2d 722. It is rather, a succession statute, speaking as of the time of death, and governing the rights of testamentary disposition and succession enacted under the state's power to regulate the descent of or succession to, property within its borders. Estate of Miller, supra, 31 Cal.2d at pages 196–197, 187 P.2d 722; Irving Trust Co. v. Day, 314 U.S. 556, 562, 62 S.Ct. 398, 86 L.Ed. 452.

[8, 9] In contending that the court erred in its application of the California law to the property rights of a husband in the accumulations of a wife derived from her operation of a business which is originally her separate property, plaintiff argues that various findings made by the court, to the effect that the property settlement agreement remained in full force and effect throughout the second marriage and controlled the status of all acquisitions by the parties subsequent thereto, are in conflict with the governing decisions. Relying on Barham v. Barham, 33 Cal.2d 416, 202 P.2d 289, and Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal.App.2d 416, 95 P.2d 966, he argues that the executory provisions of a property settlement agreement are abrogated by a remarriage of the parties; and that in any event the agreement which was an integrated bargain containing inseparable provisions that the parties shall live separate and apart and be relieved of their reciprocal duties to support each other regardless of their marital relations, is unenforceable as against public policy and an invalid attempt to alter the normal incidents of marriage. Civ.Code, sec. 159; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A., N.S., 880. Assuming but without deciding that this case comes within such rule, the simple answer to plaintiff is that having by his acts and conduct permitted title to the property in dispute to vest in his wife by his observance of the contract, and being *in pari delicto* in the alleged illegality by his complete acquiescence in its full execution, he is not now entitled to receive the aid of the courts in recovering the property relinquished to the wife under the contract he now stigmatizes as against public policy. Brooks v. Brooks, 63 Cal.App.2d 671, 676, 147 P.2d 417. "Ordinarily, the parties to a contract, void because contrary to public policy will be left where they are, when they come to the court for relief (citing cases)." Stanley v. Robert S. Odell & Co., 97 Cal.App.2d 521, 531, 218 P.2d 162, 169. On this principle alone the judgment might be affirmed. However, we do not deem it necessary to determine the cogency of these arguments, since, in the view we take, the issue of whether any part of Mrs. Logan's estate consisted of community property is fully decided by other findings of the court adverse to plaintiff's claim.

[10–12] The court found that at the time of the second marriage the utility business belonged to Mrs. Logan as her separate property; that its increased value at the time of the sale of its assets resulted primarily from the growth of the population and improvement in the economic conditions in Mexicali; that none of the income or profits of the business were attributable to the energy, ability or industry of Mrs. Logan; that the dividends she received from the earnings and income of the company did not exceed a reasonable rate of return and interest on the value of the stock; that all the moneys received by Mrs. Logan as salary were used and consumed by her in meeting the living expenses of the spouses; and that all the assets included in Mrs. Logan's estate were either acquired by her before her second marriage or from the proceeds of her separate property. Plaintiff attacks these findings by taking the position that all but the ten percent of the stock in the Mexican company which Mrs. Logan owned in 1923 is community property, so that 90 percent of the proceeds derived from the sale of the utility company must be classified as community property. He also contends that all the profits, accretions, and enhancement in value of the utility company during the period of both marriages is directly attributable to the skill, capacity, and personal initiative of Mrs. Logan and therefore belong to the community. Both arguments are untenable and unjustified under the circumstances of this case.

It is manifest that by virtue of the property settlement contract agreed to by the parties, Mrs. Logan was recognized as the sole owner of the Mexican company and of the stock therein, so that at the time of her second marriage this was her separate property. It is the general rule that the rents, issues and profits obtained from the separate property of one spouse are invested with the same character as the property which produced it. Boyd v. Oser, 23 Cal.2d 613, 621, 145 P.2d 312. However, where such separate property is a business whose continued success and lucrativeness after the marriage depends on the contribution of the toil and talents of the husband or wife, then that portion of the increment, profits, or returns attributable to his or her labor is normally community property. 3 Cal.Jur., 10-year Supp., Community Property, sec. 46, p. 534. Where, as in the case at bar, a wife owns a utility enterprise at the time of her marriage which she continues to operate thereafter, the question of what portion of the profits and enhancement in value of the business is to be allocated to the personal ability, initiative and industry of the wife and classed as community property is a question of fact turning on the circumstances of each individual case. In re Estate of Gold, 170 Cal. 621, 623, 151 P. 12. In making such apportionment between separate and community property our courts have developed no precise criterion or fixed standard, but have endeavored to adopt that yardstick which is most appropriate and equitable in a particular situation, Todd v. McColgan, 89 Cal.App.2d 509, 513, 201 P.2d 414, depending on whether the character of the capital investment in the separate property or the personal activity, ability, and capacity of the spouse is the chief contributing factor in the realization of income and profits. Estate of Gold, supra. Two diverse methods of apportionment have been developed. In Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, the husband was actively engaged in conducting a business which was his separate property and worth $15,000 at the time of the marriage. When the marriage was dissolved its value had inceased to $70,000. The court held that the husband's separate property amounted to his original investment plus a fair return thereon measured by the usual interest on a long investment well secured, which was fixed at seven percent. The increment being attributable to the personal efforts of the husband, belonged to the community estate. This rule was followed in McDuff v. McDuff, 48 Cal. App. 175, 191 P. 957; In re Estate of Caswell, 105 Cal.App. 475, 288 P. 102; In re Estate of Fellows, 106 Cal.App. 681, 289 P. 887, and kindred cases. Another approach to this problem in harmony with the principle of apportionment in fixing the character of property acquired in the conduct of a business belonging to one spouse is taken in the case of Van Camp v. Van Camp, 53 Cal.App. 17, 199 P. 885. There the husband at the time of the marriage was the controlling stockholder and manager of a corporation by which he continued to be employed after his marriage. He received a salary plus expenses for performing his managerial duties, but his principal income was derived from dividends on the stock he held. In an action for divorce the wife urged that the dividends as well as the salary were community property, since they were produced by the husband's personal capacity and industry. The court found that the husband's salary was commensurate with his labor for the corporation and this was an adequate return to the community.

The recent tendency of the cases is to undertake an equitable apportionment of the income from a business between community and separate property "in accordance with the extent to which it is allocable to the husband's efforts or his capital investment." Huber v. Huber, 27 Cal.2d

784, 792, 167 P.2d 708, 713. In applying this principle of apportionment the court is not bound either to adopt a predetermined percentage as a fair return on business capital which is separate property nor need it limit the community interest only to the salary fixed as the reward for a spouse's service but may select whatever formula will achieve substantial justice between the parties. Todd v. McColgan, supra, 89 Cal.App.2d at pages 513–514, 201 P.2d 414.

It is primarily a question of fact "for the court to determine what portion of the profits thereafter arises from the use of this (separate) capital and what part arises from the activity and personal ability of the husband." Witaschek v. Witaschek, 56 Cal.App.2d 277, 281, 132 P.2d 600, 603. An examination of the record convinces us that the inferences drawn and conclusions reached by the court are supported by the evidence. By 1937 the utility company had been a going business for over 25 years and its books showed a generally favorable balance after 1924. It had long outgrown its period of inefficiency and had become stabilized in its administrative and organizational operations. Between 1937 and 1943 the net worth of the business increased from 956,499 pesos to 1,195,185 pesos, an augmentation of 238,985 pesos. During this same period dividends were paid to Mrs. Logan in the sum of 239,040 pesos. Thus, translating these gains over a six-year period into their approximate equivalent in dollars, the value of the business, whose assets were worth about $250,000 at the time of the marriage, were enhanced in value about $50,000 at the time of the sale, while Mrs. Logan received $47,808 in dividends on her stock. Considering the evidence that there was a gradual expansion in the physical size of the city of Mexicali, and in its economic development, that Mrs. Logan was 68 years old at her marriage and 74 years old when the business was sold, that the business was run by its Mexican managers, that Mrs. Logan had no office at the business, visited the plant only at sporadic intervals, spent most of her time at home or in traveling, made no significant decisions affecting the business, and was content with the continuation of the routine which had long been established, the court properly found that the enhancement in the physical value and the amount of profits earned was essentially an enhancement characteristic of a capital investment in a stable and flourishing business. Van Camp v. Van Camp, supra. That the dividends paid were a reasonable return on her investment is equally supportable. "* * * it is not the profits of the business, but only the ascertained earnings of the defendant from his individual efforts in managing, laboring on and caring for such property, in the nature of salary, wages or the equivalent thereof, which would be community property (citing case)." Cozzi v. Cozzi, 81 Cal.App.2d 229, 232, 183 P.2d 739, 741. That descendant's participation in the business from 1937 to 1943 was not responsible for its success, its increased value or its profits is reasonably to be inferred from the record. The court was therefore entitled to conclude that the sum of $40,697 drawn by Mrs. Logan as her salary during this time was all that could be attributed to the community and adequately compensated the community for the efforts she expended, in view of the advanced stage of development to which the business had been brought prior to her second marriage. Van Camp v. Van Camp, supra; Gump v. Comm'r of Internal Revenue, 9 Cir., 124 F.2d 540, 543.

[13, 14] Without embarking on a comprehensive recapitulation of the evidence regarding the style of living of the spouses, it is patent that the court's determination that all salaries received by Mrs. Logan were disbursed to meet living expenses is amply sustained by clear and convincing evidence. In re Estate of Tompkins, 123 Cal.App. 670, 675, 11 P.2d 886; In re Estate of Ades, 81 Cal.App.2d 334, 338, 184 P.2d 1. Unless the contrary is shown, "the law presumes that money used in the maintenance of the family is drawn from community funds before there is encroachment on separate property." [123 Cal.App. 670, 11 P.2d 888.] Estate of Tompkins, supra; In re Estate of Cudworth, 133 Cal. 462, 468, 65 P. 1041. Since this was the sole item which could be classed as community property, and since the record shows that from the time of the sale of her business to 1949, when she had no independent earnings, she spent $60,125 to support the family as well as in making gifts to which plaintiff did not object, the court could well presume that all community funds were exhausted, and that indeed her separate corpus had been encroached upon. Since the other property in Mrs. Logan's estate consisted of property purchased with the proceeds of separate property, such evidence was "as effective to prove that all assets of the estate are separate property as a specific showing from which separate source each asset flowed." Estate of Ades, supra, 81 Cal.App.2d at page 339, 184 P.2d at page 4.

[15–17] Plaintiff next argues that the court erred in admitting into evidence Mrs. Logan's wills and in making a finding that her last will contained a declaration that all property that she possessed was separate property. Although such evidence was inadmissible as proof of the character of the property in question its admission was not prejudicial in view of the other decisive evidence on this point. Potter v. Smith, 48 Cal.App. 162, 169–170, 191 P. 1023. Likewise, the incorporation of such a declaration in the findings is not prejudicial where the judgment does not rest upon that particular finding for its validity. American Nat'l Bank of San Francisco v. Donnellan, 170 Cal. 9, 15, 148 P. 188. If one finding, sustained by sufficient evidence, will support the trial court's judgment, as do the findings before referred to in the present case, an appellate court will presume that the judgment was predicated on such finding, and questions relative to other findings become immaterial upon appeal and may be disregarded. American Nat'l Bank v. Donnellan, supra; Mershon Co. v. Pachmayr, 88 Cal.App.2d 901, 904, 199 P.2d 687.

There is ample evidence to support the essential findings on which the judgment is based.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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114 Cal.App.2d 527

MARR et al. v. SUPERIOR COURT IN AND FOR SISKIYOU COUNTY.

Civ. 8324.

District Court of Appeal, Third District, California.

Dec. 3, 1952.

Proceeding in prohibition, involving question of conflicting orders of Juvenile Court and Superior Court. The District Court of Appeal, Van Dyke, J., held that when Juvenile Court has assumed jurisdiction and declared an infant within the statutory classifications to be its ward, and has directed that certain persons have custody of infant, custodial orders of other courts which interfere with the exercise by Juvenile Court of such full control over minor as is proper in order that it may perform the duties to its ward, are void.

Writ issued.

1. Evidence ⚷14
Infants ⚷16.12

Where it was alleged and found on petition in juvenile court to have child declared a ward of juvenile court, that 8 months old child had no parent or legally appointed guardian actually exercising proper parental control, it was matter of judicial notice that infant was in need of parental control, and decree of Juvenile Court adjudging child to be its ward was not void because of absence of allegation or finding that infant stood in need of parental control. Welfare and Institutions Code, § 700(b); Civil Code, § 226b.

2. Infants ⚷16.1

"Parental control" means such control as parents ordinarily exercise, and carries with it the implication of proper care and support of the infant as part of the usual incidents of the exercise of control.

See publication Words and Phrases, for other judicial constructions and definitions of "Parental Control".

3. Pleading ⚷6
Trial ⚷391

Matters of judicial knowledge need not be alleged or found.

4. Adoption ⚷10

Section of Civil Code providing in substance that whenever in any adoption proceeding the petitioner desires to withdraw the petition or to dismiss the proceedings, the court may nevertheless retain jurisdiction over the child for the purpose of making such order or orders for its custody as the court may deem to be in the best interests of the child, does not prevent a Juvenile Court from assuming custody in a proper case, including case wherein adoption proceedings were pending as to 8 months old infant in need of parental control. Welfare and Institutions Code, §§ 700, 730, 735; Civil Code, § 226b.

5. Courts ⚷475(1)

Provisions of Welfare and Institutions Code providing that when proceedings are initiated in Juvenile Court to declare a minor a ward, minor may be kept upon order of court in such suitable place as court may direct until final disposition of case, and that when such person is found to be within court's jurisdiction, court shall adjudge person to be its ward and make necessary orders, constitute statutory plan which requires that orders of Juvenile Court concerning physical custody of ward supersede any existing or future orders of other courts made in custodial matters in conflict and interference therewith. Welfare and Institutions Code, §§ 700, 730, 735; Civil Code, § 226b.

6. Courts ⚷475(1)

Where juvenile court, pending proceedings for adoption of 8 months old infant of unwed mother who resided in foreign jurisdiction, assumed jurisdiction and declared infant to be ward, and placed child in custody of certain parties, order of Superior Court, made after withdrawal of petition for adoption, purporting to order delivery of infant to its mother, and finding parties to whom child had been delivered by juvenile court, in contempt, was an interference with order of juvenile court and void, and Superior Court would be prohibited from taking further proceeding against parties into whose custody child had been delivered. Welfare and Institutions Code, §§ 700, 730, 735; Civil Code, § 226b.

7. Contempt ⚷21

One accused of contempt for disobeying an order of court may purge himself by showing that the order is void or unlawful.

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Robnett & Wilson, Alturas, for appellant.

Tebbe & Correia, Yreka, Richard L. Mayers, Deputy Atty. Gen. for Dept. of Social Welfare as amicus curiae.

VAN DYKE, Justice.

This is a proceeding in prohibition. On May 23, 1951 a child was born in the State of Washington to an unwed mother who, within a few days after the birth of the infant, executed a consent to its adoption by Clifford L. and Estelle Grove, residents of California. The consent was executed in accordance with the laws of Washington, but not in accordance with the laws of California. Mr. and Mrs. Grove brought the child to their home in Siskiyou County, in which county they then resided. On July 15, 1951, they filed in the Superior Court of that county a petition for the adoption of the child. While the adoption proceedings were pending, the mother changed her mind concerning adoption, asserting that the consent form had been executed by her under misunderstanding and mistake. She came to California to claim her child. By that time the Groves were residing in the County of Modoc. On February 5, 1952, petitioner here, who is the probation officer of the County of Modoc, filed in the juvenile court of that county his petition to have the child declared a ward of the juvenile court. The mother appeared at the hearing of the petition, represented by counsel, and the juvenile court on February 8th declared the child a ward of the court, finding that it came within the provisions of subdivision (b) of Section 700 of the Welfare and Institutions Code. It was ordered that the child be committed to petitioner Marr as probation officer to be by him placed with Mr.

and Mrs. Grove. No appeal was taken by the mother from the order of the juvenile court and the same became final. The Groves still have the infant. The State Department of Social Welfare investigated the adoption matter and on July 31, 1952 reported to the Superior Court of Siskiyou County, recommending that the petition for adoption be denied and that the child be returned to the care and custody of the mother. While reporting favorably upon petitioners for adoption, the department found that the consent of the mother had not been executed in accordance with California law and that therefore the minor was not legally free for adoption. The department withheld its consent. On July 15, 1952, the child's mother asked the court in the adoption proceedings to order Mr. and Mrs. Grove to show cause therein why the proceedings should not be dismissed and the child delivered to her. She supported the application by an affidavit asserting that she had never consented to the adoption of her child in the manner and form provided by the California Civil Code and that it would be for the child's best interest that it be delivered to her so she might take it to her residence in Washington. The order asked was issued, the court acting through Honorable Claude E. Gillis, judge pro tempore. Mr. and Mrs. Grove were ordered to produce the child in court "there to be disposed of as may be directed." Between the service upon them of the order to show cause and the date of the hearing thereof, Mr. and Mrs. Grove filed in the adoption proceedings their written consent to the dismissal thereof and served and filed also notice of motion to dismiss the same. In support of the motion they brought to the attention of the Siskiyou court all of the proceedings in the juvenile court of Modoc County. They took the position, and so informed the Siskiyou County court by affidavit filed therein, that it was beyond their right and power to produce the child without an order of the juvenile court permitting them so to do. Mr. and Mrs. Grove did not appear at the hearing of the order to show cause. Their attorneys appeared, introduced in evidence a certified copy of the juvenile court order and presented and argued their motion to dismiss the adoption proceedings in view of the lack of consent to adoption. They objected on jurisdictional grounds to the court hearing the order to show cause or taking any action thereunder save to grant the prayer of the mother for the dismissal of the adoption proceedings. The court proceeded to hear the order and took the same under submission. Thereafter the court took the following action: It made an order awarding the child to the mother and ordered Mr. and Mrs. Grove to deliver it to her. It adjudged the Groves to be in contempt for failure to produce the child in court. It ordered that for that contempt they be committed to the Sheriff of Siskiyou County until they should produce the child before the court and in any event until the expiration of five days; further that each pay a fine of $100 or on failure thereof be confined in the county jail one day for each $2 of such fine. Finally, the court decreed that when the child should have been so delivered, the commitment for contempt completed and the fines paid, the adoption proceedings should "stand dismissed." Marr, the probation officer, and Mr. and Mrs. Grove thereupon petitioned this Court for an alternative writ of prohibition, directed to the Superior Court of Siskiyou County staying all said proceedings, which writ was issued. It is apparent from the foregoing that the custodial orders made by the respondent court immediately and totally conflict with the like orders of the juvenile court of Modoc County. There is presented, therefore, the question of which of the conflicting orders is paramount.

[1–3] The respondent court first takes the position that its orders could not conflict with those of the juvenile court because the decree of that court adjudging the minor child to be its ward was void for want of jurisdiction. It places this contention upon the ground that the petition filed by probation officer Marr in the juvenile court, though containing all other allegations necessary under the statute, omitted an allegation that the minor stood in need of parental control. The same defect appears in the decree. While the court found that the child was within the County of Modoc, was a person of the age of 8 months, had no parent or legally-appointed guardian actually exercising proper parental care over her and was a person coming under the provisions of subdivision (b) of Section 700 of the Welfare and Institutions Code, yet it omitted any express finding that the infant stood in need of parental control. Respondent's contention cannot be sustained. When it is alleged and found as to an 8 months old child that it has no parent or legally-appointed guardian actually exercising proper parental control, it can be inferred therefrom that such an infant is in need of such control. Such a matter is one of judicial notice. Parental control means such control as parents ordinarily exercise and the phrase carries with it the implication of the purpose of parental control over such an infant, that is, its proper care and support, the usual incidents of the exercise of control over it. Matters of judicial knowledge need not be alleged or found. French v. Senate of California, 146 Cal. 604, 607, 80 P. 1031, 69 L.R.A. 556, and Bell v. Southern Pacific Company, 189 Cal. 421, 425, 208 P. 970. Moreover, nicety of procedure is not required in juvenile court matters. In re Marmaduke, 114 Cal.App. 278, 282, 299 P. 835, 837. As the court there said:

> "* * * In the case entitled In re Gutierrez, 46 Cal.App. 94, 96, 188 P. 1004, 1005, it is held that: 'even where the petition is obviously open to demurrer for an insufficient statement of the facts, if it appears from the declarations that there is a purported or attempted statement of facts which would confer jurisdiction, the question as to such sufficiency of statement will not be examined into on habeas corpus.'"

[4–7] Because the adoption proceedings were pending in the respondent court at the time the juvenile court of Modoc County declared the infant to be its ward it is contended that the respondent court had jurisdiction to dispose of the matter of the child's custody if and when it should dismiss the petition for adoption. Respondent court relies paricularly on the provisions of Section 226b of the Civil Code, which section provides in substance that, whenever in any adoption proceeding the petitioner desires to withdraw the petition or to dismiss the proceedings, the court, notwithstanding such withdrawal or dismissal, "may retain jurisdiction over the child for the purpose of making such order or orders for its custody as the court may deem to be in the best interests of the child." We think these provisions of the code do not prevent a juvenile court from assuming custody of a minor in a proper case. Section 700 of the Welfare and Institutions Code declares that the jurisdiction of a juvenile court extends to any person under the age of 21 years who comes within certain classifications therein set forth, one of which is that of a person who has no parent or guardian actually exercising proper parental control and who is in need thereof. Section 730 provides that when preceedings are initiated to declare a person a ward of the juvenile court the minor may be kept upon order of the court in such suitable place as the court may direct until the final disposition of the case. Section 735 requires that when such person is found to come within the provisions of Section 700 the court shall adjudge such person to be its ward and make such orders as may be necessary for its care. We think these and related provisions of the code constitute a statutory plan which for its fulfillment requires that when a juvenile court has adjudged an infant to be its ward then the orders of that court concerning the physical custody, control and care of its ward supersede for so long as necessary any existing orders of other courts made in custodial matters which conflict therewith and that this situation also makes void custodial orders of other courts thereafter made which interfere with the exercise by the juvenile court of such full control over the minor as is proper in order that it may perform the duties it owes to its ward. When it enacted the juvenile court law the Legislature was concerned with matters differing markedly from custodial proceedings in other courts which do not ordinarily concern themselves further than to award custody to certain persons and then to exercise supervisory control through continued jurisdiction. Under the juvenile court law, however, it was intended that the court itself, acting under the doctrine of parens patria should assume, for so long as it deems necessary and to the extent it deems necessary, the complete physical custody, control and care of the person which it declares to be its ward. It was not intended that during the existence of that wardship such matters should be interfered with in any way by custodial orders of other courts. Whether the respondent court during the pendency or upon the dismissal of the adoption proceedings could either pendente lite or finally make any order concerning the custody and control of the ward of the juvenile court is beside the point here. Whatever its general powers might be, the assumption of physical control of the ward by the juvenile court through its officer, petitioner Marr, and its agents, petitioners Grove, was, to the extent necessary, the assumption of an exclusive jurisdiction such as to completely exclude, pro tempore, the conflicting operation of any other court's orders. That was the situation existing when the respondent court made its order to show cause. In so far as by that order it sought to compel the production of the infant before it, it was attempting to interfere with the exclusive jurisdiction of the juvenile court. This it could not do. Before it took action purporting to order the delivery of the infant to its mother, and finding petitioners Grove in contempt, it was fully acquainted with the fact and extent of the jurisdiction and control of the juvenile court. Its orders could not be carried out without interfering with the orders of that court. The disobedience of petitioners Grove to its order to produce the infant before it, in order, as it said, that it might dispose of its custody, would have involved a breach of the orders of the juvenile court and was therefore justified. One accused of contempt for disobeying an order may purge himself by showing that the order is void or unlawful. (5 Cal.Jur. 918.)

Other matters are argued in the briefs but since the foregoing adequately disposes of the merits it is unnecessary to discuss them.

The orders of respondent court purporting to presently award custody and control of the child to its mother and directing petitioners Grove to deliver the child to her, adjudging petitioners Grove to be in contempt and decreeing their punishment therefor are all annulled.

The respondent court ordered that when the child had been delivered to its mother and petitioners Grove should have undergone the decreed penalty for their contempt the adoption proceedings should stand dismissed. Since we have annulled these orders there is nothing to prevent the dismissal taking immediate effect.

Let a permanent writ issue in accordance herewith.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

114 Cal.App.2d 412

PEOPLE v. DARBY.

Cr. 4839.

District Court of Appeal, Second District,
Division 2, California.

Nov. 26, 1952.

Hearing Denied Dec. 23, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of violating statutes precluding State officers, including school board members, from having an interest in contracts made by them in their official capacities, and he appealed. The District Court of Appeal, Moore, J., held that board member who had procured appointment on purchasing committee, and who had inquired whether ice cream merchant would be interested in contracts for supplying board, and had stated that he could help in procuring such contracts, and who at same time inquired whether merchant desired to lease certain premises owned by board member for ice cream store, and who executed lease thereof prior to contract, had a prohibitive interest in contract subsequently made.

Judgment and order denying motion for new trial affirmed.

McComb, J., dissented.

1. Statutes 🔑231

The codified laws combine to speak for the sovereign power, and all constitute but a single statute.

2. Schools and School Districts 🔑20

Mere fact of existence in codified laws of an "Education Code" does not preclude the law-enforcing agencies from consulting the other codes, including the "Government Code" and the "Penal Code" for purpose of determining the propriety of conduct of affairs of school district, and punishing improprieties found. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

3. Municipal Corporations 🔑211

Although the school system is a matter of general concern and the members of the board are governed by state laws, yet with respect to their election, tenure and removal, they are municipal officers and are subject to provision of Government Code prohibiting city officers from being interested in any contract made by them in their official capacity, and are subject to the penalties of the Government Code, notwithstanding provision of Education Code also inhibiting such interest. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

4. Schools and School Districts 🔑79
States 🔑95

Provision of Government Code precluding state officers from having interest in any contract made by them in their official capacity applies to all persons clothed with functions affecting the public, which functions deraign from state laws, including members of board of school district, since school district is a state agency and its board members state officers. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

5. Statutes 🔑223.2(1)

The Government Code and the Education Code are not antagonistic laws, but are parts of the State's jurisprudence to be harmonized and given effect as to each section, including sections of each code prohibiting interest by State officers, including school board members, in contracts made by them in their official capacity. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

6. Statutes 🔑76(1)

In view of provision of Government Code making interest by State officer in contract made by him in his official capacity a felony, if provision of Education Code inhibiting same offense, but making same a misdemeanor, be construed as a specific statute applicable only to trustees of a school district, then same would be invalid as subjecting them to a less penalty than applicable to other public officers for the same offense. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

7. Schools and School Districts 🔑79

Provision of Education Code and of Government Code prohibiting member of board of trustees of school district from being interested in any contract made by board of which he is a member does not merely inhibit the direct sharing in profits or advantages to be derived from a contract made by board, but also forbids a member from entering into any business relation or arrangement with a person that will tend to cause the member to favor such person when any contract shall be presented by him for the board's approval. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

8. Schools and School Districts 🔑79
States 🔑95

Provisions of Government Code and Education Code inhibiting public officers, including school board members, from being interested in contracts made by them in their official capacity is in furtherance of public policy premised on principle that one cannot faithfully serve two masters at one and the same time. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

9. Schools and School Districts 🔑79
States 🔑95

Provision of Education Code prohibiting board members from having an interest in contracts made by them in their official capacity and provision of Government

Code prohibiting such interest as to all State officers and making offense a felony were not in excess of the authority of the Legislature to enact measures to protect the public interest, and consequently the absence of requirement of specific criminal intent had no invalidating effect. Government Code, §§ 1090–1092; Education Code, §§ 1011, 1013, 1014.

10. Criminal Law 🔑21

The requirement that a criminal statute require a specific criminal intent does not apply to crimes based on public policy, and an act is so predicated if, in order to save State from certain acts universally deemed to be inimical to public welfare, the act is forbidden and a penalty is prescribed for its violation.

11. Criminal Law 🔑13

In order to make a criminal statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited, and in determining whether statute is sufficient to inform those subject to it as to what is required of them, court must view statute from standpoint of reasonable man who might be subject to its terms.

12. Criminal Law 🔑13

Provisions of Education and Government Codes prohibiting State officers, including school board members, from having an interest in any contract made by them in their official capacity, are not invalid for vagueness as to the acts and conduct prohibited. Government Code, §§ 1090–1092; Education Code, §§ 1011, 1013, 1014.

13. Criminal Law 🔑13

Mere difficulty in ascertaining the meaning of words employed in a criminal statute, or fact that language is ambiguous, will not invalidate statute on account of vagueness, since statute must be upheld unless its nullity clearly, positively and unmistakably appears.

14. Criminal Law 🔑1144(13), 1159(2)

Appellate Court in a criminal case must assume as true the existence of every fact which the jury could reasonably have found, and every fair inference which it could have deduced, and only when, as a matter of law, no substantial, legal evidence can be found in the record in support of verdict may verdict be set aside.

15. Schools and School Districts 🔑63(3)

Evidence sustained conviction of school board member of violation of provisions of Education and Government Code prohibiting a State officer, including a school board member, from having an interest in contract made by him in his official capacity as board member. Government Code, §§ 1090–1092; Education Code, §§ 1011, 1013, 1014.

16. Schools and School Districts 🔑79

Under statutes prohibiting school board member from having an interest in contract made by board, whether a trustee holds a prohibited interest at time he votes for contract must be determined from all the facts existing at the time of its execution. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

17. Schools and School Districts 🔑63(3)

Where school board member who had procured appointment to board purchasing committee inquired of ice cream merchant whether he would be interested in bidding on ice cream contracts, and offered to assist him in procuring same, and at same time inquired whether he would be interested in leasing certain business premises of member, and lease and payment for first and last month rental on store was complete at time ice cream contract was executed, member had a sufficient prohibitive interest existing at time he voted for contract within contemplation of statutes prohibiting board members from being interested in any contract executed by them in their official capacity. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

18. Schools and School Districts 🔑63(3)

In prosecution of school board member under statutes inhibiting interest by such members in contracts executed by them in their official capacity, wherein it appeared that member had acted on ice cream contracts made with lessee of member's building, evidence warranted findings that member not only had knowledge of his interest, but that he had attempted to transmute it into material gain. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

19. Criminal Law ⚷822(6)

In prosecution of school board member under statutes preventing such officials from having an interest in contracts made by them in their official capacity, instructions given on behalf of defendant on nature of interest required were not inconsistent with instruction given on behalf of people pertaining to such interest, when the three instructions, read as a whole, informed jury that if interest of member was sufficient to cause him to be swayed in slightest degree from his public duty, it was in violation of statutes. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

20. Criminal Law ⚷1137(3), 1172(4)

Where instruction given on behalf of people in prosecution for violation of statutes inhibiting public officials from having interest in contracts made by them was a correct statement of law, if instructions given on behalf of defendant which were more advantageous to him than would have been required, were conflicting, any conflict in instructions was caused by defendant's own act in submitting his instructions, and did not constitute reversible error. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

21. Criminal Law ⚷1169(1)

In prosecution of school board member for having interest in contract made by board in violation of statute, wherein instruction was given that the people do not have to prove actual fraud, dishonesty, or loss, and that it is not a defense that there was no actual fraud or dishonesty or loss, admission of evidence of fraud and dishonesty on part of defendant was not prejudicial to defendant, since there is no inhibition against allowing proof of dishonesty, if it exists, even though jury's main concern was merely to determine whether accused was interested in contract. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

22. Schools and School Districts ⚷63(3)

In prosecution of school board member for having interest in contract executed by board of which he was a member in violation of statute, wherein it appeared that interest was in nature of lease of his premises to party with whom contract was made, admission of evidence of member's attempt to obtain a higher income from his store by helping his lessee procure a contract with the board was not error. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

23. Witnesses ⚷255(9)

The permitting of the District Attorney in a criminal trial to refresh the memory of a witness by reading to him on the stand his testimony before the grand jury is not improper as an impeachment of the witness.

24. Criminal Law ⚷1170(1)
Schools and School Districts ⚷63(3)

In prosecution of school board member for having interest in contract made by board as prohibited by statute, instruction that fact that savings to school system resulted from the bid which culminated in contract was no defense to charge contained in indictment was proper, and consequently the rejection of evidence to show such savings could not have been prejudicial error. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

25. Criminal Law ⚷1166½(12)

In prosecution of school board member for having interest in ice cream contract made by board of which he was a member in violation of statute, wherein key witness of prosecution had testified that member had "inferred" that with right prices witness might be able to acquire a little ice cream business with board, court's examination of witness with respect to use of word "inferred", resulting in disclosure that member had in substance said that witness might get some of the board's ice cream business, was not prejudicial error, since it was court's duty to see that no testimony was left in a fog by reason of misuse of words by witness. Government Code, §§ 1090–1092; Education Code, §§ 1011, 1013, 1014.

26. Criminal Law 🔑1166½(12)

Where court in prosecution of school board member for violation of statute prohibiting members from having interest in contracts made by them in their official capacities clarified misuse of word by witness, if such conduct be considered prejudicial, detriment was cured by cross-examination on behalf of member whereby testimony given in response to court's questions was fully developed. Government Code, §§ 1090–1092; Education Code, §§ 1011, 1013, 1014.

27. Criminal Law 🔑1169(5)

In prosecution of school board member for having interest in ice cream contract executed by board, admission of evidence of lease executed by member after contract was awarded to lessee was not prejudicial error when such evidence had been stricken by court, since jury are presumed to have followed court's order to disregard evidence. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

28. Judges 🔑51(3)

Where affidavit of judge's prejudice in criminal case did not contain facts whereby affiant would prove judge's prejudice, refusal of judge to refer affidavit to disinterested judge for trial was not improper, but judge properly proceeded to try criminal case against defendant. Code Civ. Proc. § 170.

29. Judges 🔑51(4)

Although a trial judge may not determine the charge of his own disqualification, he may disregard an affidavit of prejudice when it avers conclusions and does not contain facts in proof of prejudice.

30. Judges 🔑51(3)

An affidavit of prejudice filed against a trial judge in a criminal case presents nothing for trial by disinterested judge when accusation merely relates to purported legal opinions of trial judge. Code Civ. Proc. § 170.

31. Judges 🔑51(3)

Affidavit of prejudice against trial judge which merely charges that judge improperly denied a continuance raises no issue of fact to be tried by disinterested judge, but purely legal question addressed to the court's discretion is presented. Code Civ.Proc. § 170.

32. Schools and School Districts 🔑63(3)

In prosecution of member of school board for having interest in ice cream contract by board in violation of statute, exclusion of evidence that business manager of school system favored giving entire contract to lessee of member was not improper, in that such proof would have been immaterial. Government Code, §§ 1090, 1097; Education Code, § 1011.

33. Criminal Law 🔑1119(4)

In prosecution of member of school board for having interest in contract made with board as prohibited by statute, record was insufficient to support assertion that prosecutor had announced to news reporters at every court session what he expected to prove, and his version of the testimony, and that jurors were in position thereby to prejudge the proof before they heard it from the witnesses. Government Code, §§ 1090–1092, 1097; Education Code, §§ 1011, 1013, 1014.

34. Criminal Law 🔑1170½(1)
Witnesses 🔑274(2)

In prosecution of school board member for having interest in contract made by board as prohibited by statute, wherein character witness had testified on behalf of member, inquiries on cross-examination as to whether witness had ever heard of member staying at certain hotel as guest of principal stockholder of corporation which had contracts with board for transportation was not prejudicial error, but such inquiries were proper for purpose of testing the accuracy and honesty of testimony of character witness. Government Code, §§ 1090, 1097; Education Code, § 1011.

35. Witnesses 🔑274(2)

After a character witness has testified as to defendant's good character, his credibility is in issue, and it is proper to inquire whether witness has heard of specific rumors, occurrences or charges as to specific acts of misconduct of accused that might throw light upon witness' testimony of good reputation shown by his examination in chief, and it is not incumbent upon the prosecution to prove the truth of the rumor or asserted misdeed, for to do so would be prejudicial misconduct.

36. Criminal Law ⚷1171(5)

In prosecution of school board member for having had interest in contract made by board, as prohibited by statute, wherein defendant-member did not testify in his own behalf, district attorney's allusion, when referring to member's failure to testify, to fact that member's son had been brought home from army to testify, was not prejudicial error. Government Code, §§ 1090, 1097; Education Code, § 1011.

37. Criminal Law ⚷938(1)

The granting of a motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and whether the new witness was discovered with due diligence, whether his testimony would probably effect a different verdict are factors to be weighed by trial judge in deciding motion.

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Bates Booth and Joseph Scott, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Mark Brandler, Deputy Dist. Atty., Los Angeles, for respondent.

MOORE, Presiding Justice.

While he was a member of the Los Angeles Board of Education appellant was indicted on three counts, each accusing him of having an unlawful interest in a contract executed by the board. Count I alleged a contract between the board and the Jack & Jill Ice Cream Company, a partnership herein referred to as Jack & Jill, and that it was contrary to the provisions of section 1011 of the Education Code and section 1090 of the Government Code. He was convicted on count I but acquitted on counts II and III which alleged kindred charges with respect to certain printing contracts. Proceedings were suspended and appellant was granted probation on condition that he pay a fine of $1000. He appealed from the judgment, the order denying his motion for a new trial, the intermediate orders made by the judge, the order denying appellant's motion in arrest of judgment, and the verdict. Since the several orders and the verdict are nonappealable, the appeals therefrom will be dismissed and the various attacks upon the verdict will be considered along with the judgment and the motion for a new trial. People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253; Penal Code, § 1237.

The Background

Appellant's appointment to membership on the Los Angeles Board of Education was on May 27, 1947. He was president of the board for the school year July 1, 1948 to June 30, 1949. He was elected to succeed himself for the four-year term commencing July 1, 1951. However, he had not arrived at a general election before the commencement of the series of events recited herein.

In 1949 appellant was owner of a vacant store on Third street in Los Angeles. In June he telephoned the office of David Bresler, member of the firm of Jack & Jill. When Bresler returned the call, appellant informed him of his vacant store and commended it as a good location for commencing an ice cream business. Bresler sent Mr. Olin, general manager of Jack & Jill to inspect the store. Late in June, 1949, Mr. Olin introduced Bresler to appellant at the board's office as a partner in Jack & Jill. Appellant followed the introduction with an inquiry whether Bresler would be interested in bidding on school ice cream business. Indeed, he would, if there was a chance. Appellant could help him get it if Jack & Jill were the low bidder. Appellant thereupon injected into the discussion the leasing of his vacant store and quoted a rental of $300 monthly and suggested his earnest desire to procure a good tenant.

Arrangements were completed for appellant to draw the lease on the Third street property by inserting as lessee the name of one Wass, an employee of Jack & Jill.

Bresler would send appellant a check for $600 dated June 24, 1949, in payment of the first and last months of the lease term. On receipt of the lease signed by appellant, Bresler had Wass to execute it. Appellant received the executed lease and the $600 check. The $300 was received monthly by appellant until February, 1950. The premises were used as a retail dispensary of the products of Jack & Jill whose name was on the outside.

On July 1, 1949, appellant was by president Elliott duly appointed chairman of the Insurance Committee. He promptly called Elliott's attention to his former request to be appointed chairman of the Purchasing and Distribution Committee, herein referred to as the Purchasing Committee. Thereupon the president withdrew his appointment of Earle D. Baker from the coveted chairmanship, appointed him to the Insurance Committee, and named appellant as chairman of the Purchasing Committee. Among the duties of the latter committee is that of receiving the tabulation sheet containing a summary of ice cream bids, the names of bidders and other items on which they have bid and the prices of the bidders. On receipt of such summaries, the purchasing committee forwards its recommendations to the Board which accordingly makes the awards of contracts. The purchasing committee convened on August 4, 1949, to consider the bids on ice cream contracts. They found Jack & Jill had made the low bid and that it had already been agreed to by all other bidders. By reason of the committee's inability to find one bidder alone capable of supplying the total output required, the committee decided to allocate the business among all the bidders. There followed a discussion among the members as to whether Jack & Jill, a newcomer to Los Angeles and relatively unknown, should be given more than a token award. Appellant took the position that since Jack & Jill had put in the low bid which had been met by all the other bidders, they should have more than a token amount and suggested they be given twenty per cent, or about $90,000 a year. Appellant's proposal was adopted by the purchasing committee whereupon he signed the committee's report dated August 22, 1949, recommending the purchase of ice cream from various bidders including Jack & Jill for the year following September 1, 1949. Thus Jack & Jill received twenty per cent of the gross ice cream sales to the board for the year which paid them $68,250.18.

While some evidence was adduced that the fair monthly rental value of the Third street store in July, 1949, was $300, other proof showed it did not exceed one-half that sum. An expert witness testified that it was worth less than $300 per month. While appellant received checks for $300 each month in payment of his lease, Blagg and Bresler, the lessees of Jack & Jill, paid the latter only $125 per month for a portion of the lease term, thereby requiring Jack & Jill to absorb the differential. In February, 1950, appellant offered to lease the store to Blagg at $125 a month. Another witness testified that the successor of Blagg and Bresler obtained a lease at $250 rental monthly, and that appellant consented to reduce it to $175.

Appellant did not testify.

However, on this appeal, he submits that the proof is insufficient and the law is not adequate to warrant appellant's conviction for violating section 1011 of the Education Code and sections 1090 and 1097 of the Government Code in that he was "interested as a member of the Board of Education * * * in a contract for the purchase of ice cream products made by the said Board * * *."

The Indictment and the Statutes

Appellant was accused by indictment of "willfully and knowingly being interested as a member of the Board of Education in a contract for the purchase of ice cream products made by the said Board" with Jack and Jill, all in violation of sections 1090 and 1097 of the Government Code[1] and section 1011 of the Education Code.[2]

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[1] *Government Code*
Section 1090: "Members of the legislature, state, county, judicial district and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which

Appellant contends that the Education Code pre-empts the field of interests prohibited to school boards; that school-board members are not subject to the parallel article of the Government Code; that each unit of legislation is complete within itself and does not overlap; that if the Legislature had intended the Government Code to apply to school boards, the provisions of the Education Code would be meaningless; that the specific controls the general. Appellant contends that the framing of the accusation against him under section 1090, Government Code, is a distortion of that statute; that inasmuch as the Legislature has adopted an Education Code and included in it section 1011 specially designed to inhibit a school-board member from having an interest in a contract made by the board —having the prohibited interest may be illegal, but not a crime. The feature of section 1014 which appeals with emphasis to appellant is that it makes the act of which he stands accused a misdemeanor. Because of this clear provision applicable to school trustees, appellant contends that the court below erroneously instructed the jury that a violation of section 1011, Education Code, is a felony under section 1097 of the Government Code, and that because the lawmaker "set out the consequences of a disobedience to his will, no other consequences can be logically and fairly considered as coming within the scope of his intention." Bird v. Dennison, 7 Cal. 297, 307. Appellant concludes from the quoted decision and statutory provisions that the only remedy applicable to a school trustee who votes on a contract in which he has an interest is civil, sec. 1013, and that since no punishment is annexed, the interest prohibited by section 1011 may be illegal, but it can be no crime because a penalty is necessary to constitute a crime. Penal Code, § 15. From the conclusion thus derived appellant generalizes that no felony conviction can be had for the violation of a section of the Education Code for which no penalty is provided.

[1, 2] It would be pleasing to decipher the codes as appellant's counsel has done. At first blush it might appear that, after the Legislature has solemnly enacted statutes for the governance of those who conduct the affairs of a school district and set them up in buckram as "Education Code," the law-enforcing agencies would forego consulting the Government Code, the Penal Code or any other code and apply only the remedies provided in the Education Code. But to reason so is to indulge in interpreting the codes with a squinted view. The laws have been codified for the convenience

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they are members."

Section 1091: "State, county, judicial district and city officers shall not be purchasers at any sale nor vendors at any purchase made by them in their official capacity."

Section 1092: "Every contract made in violation of any of the provisions of Sections 1090 and 1091 may be avoided at the instance of any party except the officer interested therein."

Section 1097: "Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the State prison for not more than five years, and is forever disqualified from holding any office in this State."

[2] *Education Code*

Section 1011: "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

Section 1013: "Any contract made in violation of Sections 1011 or 1012 is void."

Section 1014: "The offering of any valuable thing to any member of the governing board of any school district, with the intent to influence his action in regard to the granting of any teacher's certificate, the appointment of any teacher, superintendent, or other officer or employee, the adoption of any textbook, or the making of any contract to which the board of which he is a member is a party, or the acceptance by any member of the governing board of any valuable thing, with corrupt intent, is a misdemeanor."

of the people. All of them combined speak for the sovereign power and all constitute but a single statute. In re Porterfield, 28 Cal.2d 91, 100, 168 P.2d 706, 167 A.L.R. 675. There is no rule of statutory construction that requires the courts so to construe a statute as to render it invalid. The reverse is more nearly the rule.

[3, 4] It is true that section 1097 applies to all public officers, but does not a school trustee come within that classification? To exclude him from the class of "all public officers" would be to defy the express mandate of the constitution. Art. I, §§ 11 and 21; Art. IV, § 25. Those provisions require all laws of a general nature to have a uniform operation and forbid the Legislature to confer special privileges or immunities or to impose a less penalty on one class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the particular subject of the law. 5 Cal.Jur., p. 797, sec. 180. Indeed, why should a member of a school board with its immense constituency and wealth be exempt from the operation of the Government Code or the Penal Code after he has violated their inhibitions if a city councilman or a supervisor must be punished for voting on a contract in which he had an interest? He is a member of a "body or board" forbidden to have an interest, sec. 1090, and he is a "person prohibited by the laws of this State from making or being interested in contracts" and has violated "provisions of such laws". Section 1097. If the Legislature had intended to restrict the application of § 1097 to any particular group or class of officers, it could easily have done so by the use of simple words instead of saying "Every officer or person * * * who violates any of the provisions of such laws * * *."

Appellant contends that the rule of *expressio unius* emphatically applies by reason of the absence of "school board member" or "school trustee" from those forbidden by section 1090 to be interested. Such contention ignores the provisions of the Los Angeles City Charter which provides for the manner and times of electing board members, their terms of office, their number and qualifications, their compensation and removal. Pursuant to such power granted by the Constitution, Art. XI, § 8½, subd. 2, the city provided for the board of trustees of the city school district and included them in the list of "City Officers." Stats. 1925, p. 1039, Art. II, § 5, Los Angeles City Charter. While the school system is a matter of general concern and the members of a board are governed by state laws, yet with respect to their election, tenure and removal, they are municipal officers. Becker v. Council of the City of Albany, 47 Cal. App.2d 702, 705, 118 P.2d 924, and therefore subject to sections 1090 et seq. of the Government Code. Furthermore, members of the Los Angeles Board of Education are "state officers" referred to in section 1090. The quoted phrase applies to all persons "clothed with functions affecting the public" which functions deraign from state laws. 21 Cal.Jur., p. 829, § 13. An officer is a state officer if the tasks performed by him are accomplished for and on behalf of the state notwithstanding the fact that his duties were restricted to a particular geographical portion of the state. Milliken v. Meyers, 25 Cal.App. 510, 514, 144 P. 321. The school district is a state agency and its board members are state officers. People v. Richards, 86 Cal.App. 86, 94, 260 P. 582.

[5, 6] If the contention of appellant that officers not specified in section 1090 are thereby excluded, all the trustees and directors of reclamation, flood control, swampland, sanitary and levee districts would have no law to nullify their contracts authorized by the vote of those having an interest. Upon no rational hypothesis could the Legislature have intended that a trustee of any of such districts should be privileged to have an interest in a contract to be adopted by the district. Clearly then, such a trustee is either a state or county officer and as such is under the ban of section 1090, and if guilty is punishable pursuant to section 1097. If a trustee of any of the several classes of districts mentioned in the first sentence of this paragraph is amenable to the cited statutory provisions of the Government Code, then there is no reason why the trustee of a school district should not be likewise subject thereto, un-

less he may be excused by reason of the existence of the Education Code. But there is no inconsistency between the two codes. Merely because section 1014 applies only to the "governing board" of a school district, its members are not thereby divested of their status as officers of the state. The Education Code, section 1014, makes it a misdemeanor for a member with corrupt intent to accept a valuable thing from a bribe giver, whereas the Government Code makes it a crime for any "officer or person prohibited by the laws of this State" from being interested in contracts adopted by his governing body. The two codes are not antagonistic laws, but both are parts of the State's jurisprudence and must be harmonized and effect given to every section. See People v. Seeley, 137 Cal. 13, 15, 69 P. 693. What the Legislature says is the law, wheresoever it be found. If section 1014 should be declared a specific statute applicable only to trustees of a school district, then it would necessarily at the same time be held invalid as subjecting them to a less penalty than must be applied to other public officers for the same offense. See Ventura County Harbor District v. Board of Supervisors, 211 Cal. 271, 276, 295 P. 6. Appellant astutely argues that all legal effects intended by the Education Code are stated therein and that criminal penalties may not be imported from the Government Code, citing 23 Cal.Jur., p. 741, § 118; Matter of Ellsworth, 165 Cal. 677, 681, 133 P. 272; Perkins v. Thornburgh, 10 Cal. 189, 191. In those decisions the courts found as a matter of law a special statute controlled a general statute.[3] Section 1014 was not intended to be a special statute designed to negate or uproot section 1097 of the Government Code. It was enacted as section 104 of the school law in 1870. Stats.1870, ch. 556, p. 824. It was amended in 1876 by changing the language "shall be, *directly or indirectly* interested" by omitting the italicized words and has come down to the Education Code in the same form. Sections 1090 to 1097 were made a part of "an Act to Prohibit Officers from Being interested in Certain Contracts" adopted May 1, 1851. In 1872 it was made into sections 920, 921 and 922 of the Political Code, and section 71 of the Penal Code. In 1943 the three sections were enacted as sections 1090, 1091 and 1092 of the Government Code, and section 71 of the Penal Code was placed in the Government Code as section 1097. But search the history of the two statutes as one will, the researcher always comes up with the discovery that it has been the constant policy of this state from the beginning to make it a crime for an officer to make a contract on behalf of a public agency while he is interested in the subject matter of the contract. The fact that the lawmakers caused section 1097 to be placed in the Penal Code in 1872 indicates a legislative intent to have it apply to *all* violators.

Sections 1011 of the Education Code and 1090 and 1097 of the Government Code are Constitutional.

[7, 8] Appellant contends that if these sections are construed to create a crime they would cause the punishment of a person for the act of others whom he cannot control. It is true that there can be no crime in the absence of a statute requiring an act or forbidding an omission. However, in taking the measure of the statutes here under consideration, it must be kept in mind that the act denounced is the "possession of an interest." The quoted phrase does not signify that a member of the Board of Education is merely inhibited from sharing directly in the profits or advantages to be derived from a contract made by the board in its official capacity. It means that a member is forbidden to enter into any business relation or arrangement with a person that will tend to cause

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[3] **For illustration, in the Matter of Ellsworth, after the Board of Supervisors had enacted Ordinance No. 89 regulating saloons in Sonoma county, an initiative ordinance was adopted limiting the issuance of licenses to bona fide hotels. Mr. Ellsworth procured a license under Ordinance 89 for operating a saloon in county territory. While he was accused of violating the initiative ordinance, the authorities undertook to apply the provisions of Ordinance 89 with which he had complied. They failed at invoking the initiative ordinance because it provided no penalty.**

the member to favor such person when any contract with the school district proposed by such person shall be presented for the board's approval. It does not require the member to acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute but if the member is for any reason placed in such position that he prefers the execution of a proposed contract more than he desires the public good to be served then he is interested and when the board authorizes the contract, such member violates sections 1090 and 1097. Sound public policy dictates that these officers shall be denied the right to have any personal interest in contracts negotiated by them in their official capacity. Such policy is obviously premised on the ancient truism that one cannot faithfully serve two masters at one and the same time. Statutes such as section 1011 carry out this policy by insuring that the public officer will not be placed in a position in which his private interests might tempt him to uphold with less vigor the interests of the public. See Noble v. City of Palo Alto, 89 Cal.App. 47, 51, 264 P. 529; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 600, 229 P. 1020. Making null a contract created by the Board of Education by virtue of the very act of confirming it was deemed by the Legislature to be an insufficient deterrent. By fixing the penalty prescribed by section 1097 for a violation, the Legislature acted within the scope of its authority. Had it not done so, crisis after crisis would arise, wicked men would usurp the power and purloin the purse of the district leaving the public ultimately helpless and in the grasp of brigands. There is no compulsion for a man to become a board member, and when he does so, he is not obliged to make alliances with others who plan to engage in a transaction with the board.

[9] Appellant asserts that "the annexation of Government Code section 1097" to section 1011 of the Education Code, thereby converting it into a crime, constitutes an inescapable legal trap; that all the essential elements of a crime are absent from 1011; that by a member's having an interest, section 1011 merely creates a status; that by the innocent vote of the board, such innocent status is immediately made into a crime even though such interest-holding member be absent at the time the fatal vote is taken. Appellant, however, cites no pertinent authority in support of his thesis and his argument is based upon unauthorized assumptions. He is not being punished for the acts of others. Viewing the statute in a reasonable light, it is seen that the act which creates the public offense is the defendant's creation of a situation whereby he becomes interested in a public contract while he is a member of the board. The interest comes under the ban of section 1090 whether the member brings about the situation or continues to be interested after knowledge of its existence. For a school trustee to have an "interest" in a contract he is not required to share directly in the profits to be realized. He has an interest the moment he places himself in a situation "where his personal interest will conflict with the faithful performance of his duty as trustee". Moody v. Shuffleton, 203 Cal. 100, 105, 262 P. 1095, 1097; see also Miller v. City of Martinez, 28 Cal.App.2d 364, 370, 82 P.2d 519; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 602, 229 P. 1020; Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 319–320, 293 P. 145. A board member must refrain from intentionally causing himself to be interested in a contract and if by chance he discovers he is interested prior to official action he should divest himself of such interest or avoid criminal liability by resigning from his office. The law does not concern itself with the nature of the contract and criminal responsibility is assessed without regard to whether it is fair or oppressive. In any event, the Legislature did not exceed the scope of its authority in enacting such measures to protect the public interest.

Appellant contends that his own lawful status may, by invoking the penalty provided by section 1097 of the Government Code, be converted into a crime by the board's lawful act in awarding a contract to the lowest responsible bidder. While it is true that the Education Code, section

18051, requires the board to award the contract to the lowest responsible bidder, appellant's argument is fallacious in that the board is prohibited from awarding a contract in which a member has an interest. Sections 1013 and 1090, supra. By virtue of such interest of a member at the time of the award the statutes are violated by all members who have knowledge of such interest. In the second place, to say that appellant had no control over the action of the board is to ignore a basic presumption, to wit, that members of the board who are disinterested in a contract will do their duty, and refrain from voting to award a contract in which another member is interested.

[10–13] Appellant attacks sections 1090 and 1097 as invalid in that they do not require a specific criminal intent. The absence of such requirement does not apply to crimes based on public policy. To save the state from certain acts universally deemed to be inimical to the public welfare, it is sufficient if the act is forbidden and a penalty is prescribed for its violation. The intent is imputed. People v. Pearson, 111 Cal.App.2d 9, 244 P.2d 35. It is also contended that the last cited sections are invalid because they are uncertain, vague and indefinite; that in defining an offense the Legislature must use language that will not deceive the common mind, citing Winters v. New York, 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840; Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322. The answer to such contention is that it is necessary only that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. "To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." Lorenson v. Superior Court, 35 Cal.2d 49, 60, 216 P.2d 859, 866. The rule of strict construction of penal statutes is abolished. They must be construed according to the fair import of their terms with a view of promoting justice. Penal Code, sec. 4; see People v. Oviedo, 106 Cal.App.2d 690, 693, 235 P.2d 612. "* * * in determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required by them, the courts must endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms." Pacific Coast Dairy v. Police Court of the City and County of San Francisco, 214 Cal. 668, 676, 8 P.2d 140, 143, 80 A.L.R. 1217. No reasonably intelligent person can fail to understand the meaning of "interest" or the significance of "contract." Both are of frequent use in the market place as well as in the counting house. Inasmuch as the language employed in the statutes under attack is clear and the words are such as a person of average intelligence can understand, it must be held that there is no want of certainty or definiteness in them. But mere difficulty in ascertaining the meaning of the words employed or the fact that the language is ambiguous will not invalidate a statute. Pacific Coast Dairy v. Police Court, supra. It must be upheld unless its nullity clearly, positively and unmistakably appears. Lockheed Aircraft Corporation v. Superior Court, 28 Cal.2d 481, 484, 171 P.2d 21, 166 A.L.R. 701. Neither is a statute void for vagueness and uncertainty if its meaning may be inferred or because the legislative intent might have been declared in plainer terms. 50 Am.Jur. 489, 490; Hunt v. State, 195 Md. 585, 146 N.E. 329, 330.

That appellant had an interest in the board's contract with Jack & Jill will appear in the discussion of the evidence.

Facts Sufficient

[14] Assuming for the moment that the law was correctly interpreted by the trial court, the labors of this court on the question of the sufficiency of the proof are abbreviated by the long-established policy of appellate procedure which binds a reviewing court to take the verdict or the findings as determined by the court below. Only when, as a matter of law, no substantial, legal evidence can be found in the record, may the appellate court set aside a verdict. The court must assume

as true the existence of every fact which the jury could reasonably have found, every fair inference which it could have deduced. People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259. The same court went a step further in People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778, 780, where it declared that before the verdict of a jury which has been approved by the trial court, can be set aside upon the ground of insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." In the same decision, the court announced that because the circumstances which convicted the accused might also reasonably be reconciled with his innocence, the appellate court will not for that reason molest the verdict.

[15] Now, not only did the State prove a series of facts and circumstances which, if believed, make appellant's guilt palpable, but despite the scorpion-like shadows that lowered over the drama he steadfastly maintained his silence; neither denied nor explained. Hence, so far as the facts are concerned, " 'However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made,' " he is guilty of being interested in the contract at the time he, as a board member, voted for it. See People v. Deysher, supra, 2 Cal.2d at page 146, 40 P.2d at page 261. Not only did appellant vote for the contract with Jack & Jill, but the jury believed the evidence that he solicited it and before sitting in judgment upon it he had leased his vacant store to the ice cream company at a generous rental and so engineered the proceedings of the Purchasing Committee as to make certain the allocation to Jack & Jill of a large share of the board's ice-cream business for the ensuing year. Had he not telephoned the office of Jack & Jill at first? Had he not followed that call with proposals to lease the vacant store? Had he not drawn the lease and put Jack & Jill in possession of the place? Had he not caused them to submit a low bid to supply the ice cream? Had he not caused his own appointment as chairman of the Purchasing Committee and induced his committee to include Jack & Jill among the contractors to share in the schools' ice cream business? But for such aggressive activities, it is not likely that the world would ever have known that appellant owned a vacant store or that his zeal to make it a paying investment would clash with his loyalty to the Board of Education. But the evidence adopted by the jury was sufficient to convince them that appellant had such an interest in the ice cream contract as would tend to prevent his exercise of a jealous concern for the best interests of the school district. In fact, the jury evidently believed that appellant's interest in Jack & Jill and their permanency as tenants of his store did influence his conduct as a trustee. So believing, their verdict that he violated section 1097 was based on legal evidence. Raymond v. Bartlett, 77 Cal.App.2d 283, 286, 175 P.2d 288; Salada Beach Public Utility District v. Anderson, 50 Cal.App. 2d 306, 309, 123 P.2d 86; Moody v. Shuffleton, 203 Cal. 100, 105, 262 P. 1095.

Appellant asserts with emphasis that there is no evidence that he was a landlord of Jack & Jill. It is true that no written lease was adduced or conversation proved showing that appellant leased his store to that partnership. But it cannot be denied that the jury drew a reasonable inference in concluding that the lease was given to Irving Wass as agent of Jack & Jill. Appellant's telephone call to Bresler of Jack & Jill that he desired a tenant for his vacant store; Bresler's return call and visit; agreement between the two on the terms of a lease and that the writing should name an employee of the partnership as lessee; the use of the store as a retail dispensary of Jack & Jill products with that name on the exterior of the building; appellant's receipt of rental checks from the office of Jack & Jill signed by Bresler Ice Cream Co., per David Bresler—such evidence and appellant's silence justified a rational inference that Jack & Jill was in fact the lessee. That deduction is further supported by the evidence that when appellant desired an advance on the rental he contacted Bresler at the Jack & Jill office and promptly received from the company a cashier's check for the advance payment of rent.

There is no proof that Wass ever paid rent on appellant's store. While the partnership of Blagg and Bresler operated their ice cream business at that location, there is no conclusive proof that they were tenants of appellant. *That firm did not exist at the time of Bresler's arrangements with appellant for the lease or when the lease was made to Wass or when appellant received the $600 cashier's check for the first payment on the lease.* Appellant can readily see that such circumstances warrant the inference that Jack & Jill were, in truth, his tenants. Indeed, in determining whether appellant had an interest in the ice cream contract, the jury was not required to take his bare denial or his explanation, but it was their function to explore the mist of conflicting evidence and find the vital, ultimate fact. People v. Deysher, 2 Cal.2d 141, 146, 40 P.2d 259.

In support of his claim, appellant contends that his purpose in having Jack & Jill bid on the ice cream contract was to bring about "a crack in the monopoly" and as a result of that bid the school year of 1949–1950 saved $72,000 and substantial savings for subsequent years and that such savings inured to the benefit of the children. While the price of a school lunch was reduced from 25 cents to 20 cents in the spring of 1949—prior to the Jack & Jill contract—yet after the contract and within the very next school year the price of a school lunch was raised back to 25 cents. Such facts were not calculated to induce the jury to adopt appellant's theory that he had caused Jack & Jill to bid on the ice cream contract to break the ice cream monopoly and save thousands of dollars to the district and its constituency. And whatever virtue might be ascribed to the Jack & Jill contract the jury were not obliged to accept it as conclusive proof that appellant had no prohibitive interest in the contract.

Was the Interest Prohibitive?

[16, 17] Appellant extends his artful argument to include the contention that an officer to be "interested" in a contract in the statutory significance of the word must participate in the advantages or detriments resulting from the contract. In support of his thesis he cites Martin Bros. v. City of Concord, 110 Cal.App.2d 215, 217, 242 P.2d 406; Escondido Lumber Co. v. Baldwin, 2 Cal.App. 606, 608, 84 P. 284, 285. Such authorities are distinguished on their facts. The city councilman of Concord could not have been influenced with respect to the contract for the reason that the interest was not yet in existence. In the latter decision the court observed: "The mere fact that the contractor, without previous arrangement or agreement, saw fit to buy of a corporation for which one of the trustees was an agent certain materials used in the construction of the house would not render the contract void, voidable, or ordinarily subject it to merited criticism." In other words, argues appellant, if the officer has a direct and present interest in a contract from which he will profit, he violates the statute by voting for the contract, People v. Deysher, supra, but if he has merely a potentially pecuniary benefit although he actually receives the benefit after the contract is executed, the interest is not prohibited. But controversies cannot be adjudicated by formulae. Whether a trustee holds a prohibitive interest at the time he votes for a contract must be determined from all the facts existing at the time of its adoption. People v. Deysher, supra, 2 Cal.2d at page 149, 40 P.2d 259; Tuscan v. Smith, 130 Me. 36, 153 A. 289, 294, 73 A.L.R. 1344; Yonkers Bus Inc. v. Maltbie, Sup., 23 N.Y.S.2d 87, 90–91. If the facts in the instant case fairly warranted the finding that appellant created the relationship of landlord and tenant between himself and Jack & Jill with the purpose of using his influence on the Board of Education to get some ice cream business awarded to his tenants, then their implied finding that he had a prohibitive interest cannot be upset. The decision in Commonwealth v. Strickler, 259 Pa. 60, 102 A. 282, is not authority: (1) it did not have such florid facts to show interest; (2) it is contrary to the statutes here involved. See Moody v. Shuffleton, 203 Cal.

100, 262 P. 1095; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 603, 229 P. 1020. In the case at bar, all negotiations for the lease and payment for the first and last months' rental on the store were complete, appellant had suggested to Bresler that he bid on the ice cream contracts and had promised his support in obtaining ice-cream business. From those facts it was reasonable to find that appellant's interest existed when the board awarded Jack & Jill the contract.

[18] The statutes are general in prohibiting an officer from being interested in a contract. He must not place himself in a position where his personal interest will conflict with his faithful performance as trustee and, however so fair the contract may appear to be, the trustee will not be suffered to occupy a position so equivocal and so fraught with temptation. Moody v. Shuffleton, supra, 203 Cal. at page 104, 262 P. 1095. Precedent is of little value except as an analogue. Whether an officer or board member was interested at the time he or his board made the contract is a question for determination in each controversy. If the jury were convinced by all the evidence that appellant intentionally created a situation whereby he became interested in the contract to be awarded by the board and that he actively participated in effectuating the contract their verdict cannot be upset. The proof reasonably warrants findings that appellant not only had knowledge of his interest, but strove to transmute it into material gain.

Instructions Not Prejudicial

[19] The discussion of "interest" brings us to appellant's attack upon the jury instructions. The prejudice, he asserts, was aggravated by the fact that the prosecution tried two cases, to wit, (1) for the defendant's acceptance of a bribe; (2) for defendant's having an interest in the contract. Appellant says that his conviction for having an interest was due solely to the suspicion and prejudice aroused by the charge of bribery and the court's "contradictory" instructions.[4] *A* was given at the request of the People; *B* and *C* were requested by appellant. If the jury had

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[4] Instruction *A*

"The word 'interested' as used in Government Code Section 1090 and Education Code Section 1011 means any influence which might interfere with a board members' unqualified devotion to his public duty. The interest may be direct or indirect and includes any monetary or proprietary benefits, or gain of any sort, or the contingent possibility of pecuniary benefits.

"The interest is direct when the board member, in his official capacity, does business with himself in his private capacity.

"The interest is indirect when the board member enters into a contract in his official capacity with a business firm, which business firm, by reason of the board members relationship to it at the time the contract is awarded, is in a position to render actual or potential pecuniary benefit to the board member based on the contract the business firm has received."

Instruction *B*

"In order to find the defendant Olin E. Darby guilty of the crimes alleged in the indictment, you must find beyond a reasonable doubt and to a moral certainty that the defendant has 'a pecuniary or proprietary interest' in the contracts alleged in Counts I, II and III of the indictment.

"It is not sufficient to find that the defendant Olin E. Darby had 'a mere possible, contingent interest' or 'mere mental interest in the question or general subject' of such contracts. In order to find the defendant guilty under any count you must find that the interest of Olin E. Darby in the contracts alleged was such that he stood to 'gain or lose something' as a result of the contracts alleged."

Instruction *C*

"The interest in contracts which is prohibited by law to members of governing bodies of school districts is not '(1) A mere possible, contingent interest, in an interest in the question or general subject to which the matter * * * relates, but one that is visible, contingent and capable of precise proof * * * it must therefore depend upon facts capable of being precisely averred and proved * * *. (2) It must be a pecuniary or proprietary interest, a relation by which * * * he will gain or lose something by the result * * *. (3) It must be certain, and not merely possible * * *.

" 'Thus the mere mental interest which one has in a public question merely be-

believed the facts as contended by appellant, instructions *B* and *C* would have been their authority to acquit. But they applied the definition of "interest" as contained in *A* and convicted him. They believed he had more than "a mere, possible, contingent, or mental interest." They determined that he stood to gain or lose something by the board's acceptance of the bid of Jack & Jill; that his interest was not remote, doubtful or speculative but was certain and direct. They found that his interest was personal and that it might interfere with the unbiased discharge of his duty to the public or might prevent his exercising absolute loyalty and undivided allegiance to the best interests of the Los Angeles School Districts. It was therefore a prohibitive interest as contemplated by the statutes. Raymond v. Bartlett, 77 Cal.App.2d 283, 286, 175 P.2d 288. If the jury believed his interest in the ice cream contract was such as to tend in any degree to influence appellant's conduct in voting for the contract, their verdict was justified. Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 602, 229 P. 1020. In that case the petitioner's foreman was a member of the City Council, but was absent at the time the contract was voted. The interest he had in the contract nullified it although it meant no direct profit to him. A similar situation obtained in Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 293 P. 145. Dressler was a member of the City Council and was on salary and was not a stockholder in, but was manager for, Hobbs & Wall, and as councilman voted to pay their claims for the merchandise purchased by Crescent City. Mr. Justice Thompson observed, 109 Cal.App. at page 317, 293 P. at page 146, that Dressler *"was indirectly interested in the transaction,* and that it was therefore illegal. * * * Our courts have been very scrupulous in the enforcement of the spirit of statutes similar to the one which is here involved." 109 Cal.App. at page 320, 293 P. at page 147. In People v. Deysher, 2 Cal.2d 141, 40 P.2d 259, the court directed the jury that defendant had a personal interest in the contract if he possessed any rights or was obligated to perform any duty or *could have suffered any liability or losses or if any benefit or advantage could accrue to the defendant, whether present, future ascertained or potential.*

In support of his contention that he had no interest in the contract, appellant cites Central Pacific Railway v. Superior Court, 211 Cal. 706, 296 P. 883; Favorite v. Superior Court, 181 Cal. 261, 184 P. 15, 8 A.L.R. 290; Ex parte Guerrero, 69 Cal. 88, 10 P. 261; Cuyamaca Water Co. v. Superior Court, 193 Cal. 584, 226 P. 604, 33 A.L.R. 1316; Goodspeed v. Great Western Power Co., 19 Cal.App.2d 438, 65 P.2d 1342. Although in each of them the interest under investigation was not in existence at the time of the contract, yet the question considered in each controversy was whether a judge was disqualified because of an interest in the matter on trial. Those decisions establish that a judge is not disqualified where his interest is "remote, contingent and speculative"; that he is not disqualified unless his interest is "direct, proximate, substantial, and certain" [193 Cal. 584, 226 P. 605.] and of such immediate character that the judge will gain or lose by the direct, legal operation and effect of the judgment. As applied to judges, "interest" has a highly special and definite meaning. "It means as interest direct, proximate, inherent in the instant event." Goodspeed v. Western Power Co., 19 Cal. App.2d 438, 444, 65 P.2d 1342, 1345. In the cases involving the judges, none of them had a "direct," "pecuniary," or "proprietary" interest in the controversy. Where public "officials" as a class are in-

cause he is a citizen or member of the civic body to be affected by the question is not the interest which the law has in mind.'

"The interest prohibited by law cannot be 'remote, doubtful and speculative' but must be 'certain in fact'.

"The interest prohibited by law is a 'certain, definable, pecuniary, or proprietary interest or relation which will be directly affected' by the action taken on the contracts in question. It is a 'pecuniary or personal right or privilege directly affected by or immediately dependent upon' the contracts in question.

"In short, the interest prohibited by law must be 'a direct, pecuniary interest' and not an interest that is speculative."

volved, there should be no laxity in the enforcement of the statutes against their having an interest.

[20] Appellant insists that his instructions *B* and *C* are inconsistent with the People's instruction *A*. Such asserted conflict is not to be discerned when all three are read as one. People v. Weatherford, 87 Cal.App.2d 275, 278, 196 P.2d 832. Instructions *B* and *C* emphasize that the disabling interest must be more than a remote, doubtful, speculative, possible, contingent or mental interest, and that in order to convict the accused, it must be found that he stood to gain or lose something. Under the evidence it was reasonable to find that the interest of appellant in the ice cream contract was such interest as might have interfered with appellant's unqualified devotion to his public duty. Whether the interest was direct or indirect, remote or contingent, the sum and substance of the three instructions read as a whole is that if the interest of the member is sufficient to cause him to be swayed in the slightest degree from his duty to the public, it is a violation of section 1097 as well as of 1011. It is more than possible that an interest may be contingent or remote and yet influence the member's judgment or vote. In view of the evidence adopted by the jury, the court was generous in giving instructions *B* and *C* but in all fairness they do not conflict with the principles declared in *A*. See Moody v. Shuffleton, 203 Cal. 100, 105, 262 P. 1095; People v. Deysher, 2 Cal.2d 141, 146, 40 P.2d 259. But conceding, arguendo, that the two instructions read at appellant's request conflict with that prepared by the district attorney, a reversal would not be proper for three reasons: (1) instruction *A* is a correct statement of the law; (2) instructions *B* and *C* gave appellant an advantage in permitting the jury to consider the facts in a light more favorable than if *A* only had been read; (3) if there be a conflict, it was caused by appellant's own act in submitting *B* and *C*. People v. Harris, 169 Cal. 53, 69, 145 P. 520; People v. Lanzit, 70 Cal.App. 498, 513, 233 P. 816.

[21] Error is assigned with respect to the following instruction: "The People do not have to prove actual fraud, dishonesty, or loss; nor is it a defense to a prosecution under section 1097 of the Government Code that there was no actual fraud or dishonesty or loss." Appellant contends that if such instruction be correct, the court prejudiced him by permitting evidence of fraud and dishonesty, i.e., the payments of excessive rentals. The answer to such contention is that there is no inhibition against allowing proof of an officer's dishonesty, for if it existed, such fact had to be a part of the evidence of his becoming interested. See Williamson v. L. A. County Flood Control District, 42 Cal.App.2d 622, 109 P.2d 992. The jury were entitled to know all the facts which tended to prove the officer's interest even though such proof might show violations of other penal statutes. See People v. Pearson, 111 Cal.App.2d 9, 244 P.2d 35. The core of the criticized instructions is that even though there is proof of dishonesty the jury's chief concern is to determine whether the accused was interested.

No Prejudice in Rulings at the Trial

[22, 23] That there was no error in admitting evidence of appellant's attempt to obtain a higher income from his store by helping Jack & Jill obtain a share of the ice cream business has been demonstrated above. Neither was there error in permitting the district attorney to refresh the memory of a witness by reading to him on the stand his testimony before the grand jury. Refreshing the memory of a witness is not to impeach him. It is a common incident of trials to remind a witness of what he said on a former occasion, and this may be done by the party calling him. People v. Durrant, 116 Cal. 179, 214, 48 P. 75; People v. Horowitz, 70 Cal.App.2d 675, 691, 161 P.2d 833; People v. Allen, 47 Cal.App.2d 735, 743, 118 P.2d 927. A detailed discussion of the witnesses whose memories were refreshed could add nothing of value to the above statement of the doctrine.

[24] In Stockton Plumbing & Supply Co. v. Wheeler, supra, 68 Cal.App. at page 603, 229 P. 1020, it was conceded that the contract was perfectly fair in all respects to the city and that neither the councilman nor his employer gained any advantage there-

by. But the contract was held illegal merely because the councilman was interested in seeing his employer make sales to the city. See also Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 320, 293 P. 145. By virtue of the law as above announced there was no error in the court's instructing the jury that the existence of a combine and that savings to the school system resulted from the bid of Jack & Jill, is no defense to the charge contained in the indictment. The rejection of evidence offered for the purpose of showing that before Jack & Jill forced competitive bidding, one of the bidders charged the schools higher prices than it received from private retail dealers and that prices to the schools were lower each year thereafter; also, the rejection of proof offered for the purpose of showing that appellant had requested Olin to be on the lookout for a good tenant for his vacant store through other ice cream companies—both rulings were correct. Such evidence was immaterial to the issue as to whether appellant had an interest in seeing Jack & Jill obtain a share of the ice cream purchases for the school. That appellant may have had an interest as a public official does not disprove that he had a personal motive in having the board accept the bid of Jack & Jill. But even had such rulings been erroneous, no prejudice could have resulted for the reason that the court did admit sufficient of such evidence to enable appellant to present his point.

[25, 26] Appellant assigns as error the court's examination of Mr. Bresler, "a key witness for the prosecution." Mr. Bresler had testified that, after the introductions were finished, appellant "inferred that with the right kind of prices we may be able to acquire * * * a little ice cream business in the Board of Education." The court thereupon examined Bresler with respect to the latter's use of the word "inferred." The court's examination developed that the witness meant that appellant had in substance said they might get some of the board's ice cream business. Not only was there no error in the court's participation in quizzing Bresler but it was the court's duty to see that no testimony be left in a fog by reason of a misuse of words by a witness. People v. Harris, 87 Cal.App.2d 818, 826, 198 P.2d 60; People v. Cagigas, 69 Cal.App.2d 301, 303, 158 P.2d 971; People v. Grebe, 105 Cal.App.2d 27, 33, 232 P.2d 564. But if the court's conduct had been prejudicial, the detriment was cured by appellant's cross-examination whereby he developed the witness' testimony to be as it had been given in response to the court's questions.

[27] No prejudice was suffered by appellant on account of the court's admitting "full evidence before the jury of an Anaheim lease entered into after the school contract was awarded." Evidence was received that appellant on August 31, 1949, leased his Anaheim store to Bresler for the purpose of showing appellant's plan, design and motive. When the court learned that the Anaheim lease was subsequent to the date (August 23, 1949) of the Jack & Jill contract, the evidence as to the Anaheim lease was stricken. The jury are presumed to have followed the court's order to disregard all the evidence relative to the Anaheim property. People v. Sourisseau, 62 Cal.App.2d 917, 929, 145 P.2d 916.

[28–30] Prior to the trial appellant filed an affidavit of prejudice against the trial judge averring that the judge was prejudiced against appellant for having failed to file his petition for a writ of prohibition in the Supreme Court by presenting it to the Chief Justice in person. He contends that the court erred in failing to comply with section 170 of the Code of Civil Procedure[5] and thereby deprived appellant of the right to have the court's disqualification tried by a disinterested judge. The fallacy of appellant's contention lies in the fact that the affidavit filed does not contain the facts whereby he would prove the judge's prejudice. Because it is insufficient in that respect, the court properly proceeded with the trial. The affidavit averred also that the judge had prejudged the law on the question of an officer's illegal interest in a contract and had refused to grant appellant a continuance during the period of the pendency of his petition in the Supreme Court. While the trial judge may not determine a charge of his own disqualification, he may disregard an affidavit of prejudice when it avers conclusions and does not contain facts in proof of his prejudice. When the affidavit is thus insufficient, the judge can so determine, whereupon the procedure provided by section 170, supra, is not applicable. Ephraim v. Superior Court, 42 Cal. App.2d 578, 109 P.2d 378; People v. Nolan, 126 Cal.App. 623, 628, 14 P.2d 880; People v. Berman, 117 Cal.App. 334, 339, 4 P.2d 226. Not only was there an absence of facts indicating prejudice on the part of the trial judge, there is not the slightest showing of his hostility toward appellant. It was therefore insufficient. Goodspeed v. Great Western Power Co., 19 Cal.App.2d 438, 450, 65 P.2d 1342. Also, there is nothing for another judge to try where the trial judge is accused merely of having erroneous legal opinions. Ryan v. Welte, 87 Cal.App.2d 888, 895, 198 P.2d 351.

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[5] Section 170 provides that no judge shall act as such in any action when it is made to appear probable that, by reason of his own bias or prejudice, a fair and impartial trial cannot be had before him. When he has knowledge of the facts which disqualify him, and fails to declare them in open court, any party appearing in the action may file his verified written objection to a trial before such judge, setting forth the facts constituting the ground of the disqualification. After the judge has filed his verified answer thereto, the question of his own disqualification shall be heard and determined by some other judge agreed upon or selected by the chairman of the Judicial Council. The section contains a detailed statement of the procedure.

[31] Another basis of the charge of prejudice against appellant was that the judge denied him a continuance. Such accusation raises no issue of fact. Such a denial involved the legal question addressed to the court's discretion. If the continuance had been denied, the trial judge had reasonable grounds. Prohibition had already been denied by both the Superior Court and the District Court of Appeal and no sufficient basis for a continuance was alleged. But, finally, the trial judge did grant a continuance of six days after the petition for a writ had been denied by this court.

Appellant charges that the District Attorney prejudiced him by withholding documentary proof that appellant's store was operated under a written agreement between Blagg and Bresler. It is conceded that Mr. Blagg, while on the stand, believed the District Attorney had possession of articles of partnership between Blagg and Bresler. Thereupon, the prosecution refreshed Blagg's memory and showed that it was the agreement of dissolution of such partnership that Blagg had in mind which document was delivered to appellant's counsel. Immediately, thereafter, Blagg produced a copy of the articles of partnership of Bresler and Blagg. However, they are immaterial for the reason that *such articles were executed after Bresler as agent of Jack & Jill had consummated arrangements to lease appellant's vacant store*—from which it was fairly inferable that Bresler took the lease for Jack & Jill.

[32] Appellant charges that he was prejudiced by the misconduct of the District Attorney's withholding evidence that the business manager of the school system favored giving the entire ice cream contract to Jack & Jill. Such proof would have been immaterial. But after the prosecution proved by three witnesses what occurred before the purchasing committee on August 4 when it considered the bid of Jack & Jill, it was shown by the cross-examination of such witnesses that the business manager of the board desired to award the entire contract to Jack & Jill. Also, he testified that to do so would have been contrary to the usual manner of awarding contracts.

[33] Appellant says he was prejudiced by the prosecutor's announcement to the news reporters at every court session what he expected to prove and his version of the testimony and that thus the jury were put in a position to prejudge the proof before they heard it from the witnesses. However, there is neither evidence of the statement made nor a bill of exceptions showing such acts were done by the district attorney. All the testimony at the trial had already been given before the grand jury. A record of it was available to the public. No part of the record is cited as proof that any juror heard any person talk about the evidence or read a news account of the testimony in violation

of the instruction given at the commencement of the trial.

[34, 35] No prejudice to appellant could have resulted from the cross-examination of his character witnesses. After they had given him a good character they were asked whether they had ever heard of appellant's staying at a hotel in Yosemite as the guest of the principal stockholder of a corporation that had contracts with the board for transportation. After a character witness has testified it is proper to make such reasonable and searching inquiries as will test the accuracy and honesty of his testimony. It is proper to inquire whether the witness has heard of certain rumors, occurrences or charges as to specific acts of misconduct of the accused that might throw light upon the witness' testimony of the good reputation shown by his examination in chief. People v. Gin Shue, 58 Cal.App.2d 625, 634, 137 P. 2d 742; People v. McKenna, 11 Cal.2d 327, 335, 79 P.2d 1065; People v. Stennett, 51 Cal.App. 370, 382, 197 P. 372. After such a witness has testified as to the defendant's good character his credibility is in issue. One means available to the prosecution for testing his credibility is to inquire in good faith whether such witness has heard of specified acts reflecting upon the integrity of the defendant. It is not incumbent upon the prosecution to prove the truth of the rumor or asserted misdeed. Indeed, an offer to prove it would be prejudicial misconduct. People v. Beltran, 94 Cal.App.2d 197, 209, 210 P.2d 238.

[36] No prejudice to the accused was caused by the district attorney's allusion, in addressing the jury, to appellant's son whom he had brought home from the army to testify. That reference was an incident in the prosecutor's discussion of appellant's failure to give his own explanation of the events established against him.

Finally, there was no error in denying the motion for a new trial. Appellant made an affidavit that he could not with reasonable diligence have discovered before the trial evidence to refute the testimony of Mr. Bresler with reference to his conversation with Bresler at the office of the board to the effect that Mr. Darby indicated that with the right kind of prices he might be able to help Bresler acquire a little ice cream business; Bresler told Darby at the board's office the check was coming from Bresler, he would send it by Olin. Such affidavit averred also that Olin could testify in contradiction to Bresler; that at the trial he had every reason to believe that Olin would deny Bresler's testimony. Because Olin was ill and could not attend the trial, appellant conceives that he should have a new trial.

[37] In the first place, the granting of the motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court. Whether the new witness was discovered with due diligence; whether his testimony would probably effect a different verdict—those were the factors that were weighed by the trial judge in deciding the motion. People v. Byrne, 160 Cal. 217, 225, 116 P. 521; People v. Chavez, 100 Cal.App.2d 214, 219, 223 P.2d 44. There was no showing of diligence. Both Olin's and Bresler's testimony before the grand jury shows that Olin was present at the board's office; that Olin there introduced Bresler to Darby. During the trial the prosecution announced Olin's illness and his inability to attend the trial for ten days. Appellant neither demanded a continuance nor leave to take Olin's deposition. Moreover, appellant, as a party to the conversation with Bresler could have testified to all that took place at the board's office. Also, no showing was made that Olin would probably recover from his illness, or if he should, that he would be able to testify. The fact that Olin would testify that at the board's office nothing was said about appellant's leasing his store to Jack & Jill does not require a new trial. If both he and Bresler should in testifying contradict each other, it would create no more than a conflict, not a ground for a new trial. In addition thereto, Mr. Olin could not deny the statements Bresler had made over the telephone with respect to Bresler's taking a lease. Neither could Olin disprove appellant's receipt of the checks for rent of the store. He was witness to neither. After the court had extended every opportunity available for the presentation of his defense

and after the accused had maintained a sphinx-like silence toward accusations and inferences that bore down upon him, it would have been gross error to allow a new trial in order for appellant to have another opportunity to gain a favorable verdict.

Appellant's motion to vacate the order correcting the record is denied. The appeals from the verdict and the several non-appealable orders, to wit, order overruling demurrer, order denying defendant's motion to set aside the indictment, order denying defendant's motion to strike the indictment, order denying defendant's motion for a continuance, order refusing to disqualify the trial judge upon defendant's filing an affidavit averring prejudice on the part of such judge, order denying defendant's motions to dismiss, before and after taking of the People's testimony, order denying motion to dismiss at the close of all the evidence, order denyng motion to instruct the jury to return a verdict for defendant, order denying motion in arrest of judgment are dismissed.

The judgment and the order denying the motion for a new trial are affirmed.

FOX, J., concurs.

McCOMB, J., dissents.

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114 Cal.App.2d Supp. 829

MATHIS v. SHAMOON et al.

No. 26511.

Appellate Department, Superior Court, Fresno County, California.

May 23, 1952.

Assignor of note brought action with consent of assignee. The Municipal Court of the Fresno Judicial District entered judgment adverse to the assignor, and the Appellate Department of the Superior Court, DeWolf, J., held that assignor was entitled to maintain action.

Judgment reversed and cause remanded for new trial.

Bills and Notes 🔑443(1)

Assignor of note was entitled to maintain action with consent of assignee.

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Haden & Haden, Visalia, for Mathis.

Martin C. Thuesen, Fresno, for Shamoon.

DE WOLF, Judge.

It appears from the Engrossed Narrative Statement of Facts, on which this case was submitted to this Court on appeal, that the action in the lower court was filed by Charles L. Mathis, doing business as Mathis & Bolinger Furniture Company, with the consent of the Furniture Contracts Company, who was the original assignee from the Mathis & Bolinger Furniture Company. In Reidy v. Young, 119 Cal.App. 322, 324, 6 P.2d 112, 113, it is said:

> "The accepted view is that the assignor may sue with the consent of the assignee * * *."

And in Mosier v. Suburban Estates, Inc. Ltd., 137 Cal.App. 574, 576, 31 P.2d 209, 210, the Court stated:

> "Plaintiffs were entitled to maintain the action, since the assignee of the notes, by its complaint in intervention, in effect, consented thereto."

A fair reading of the appellant's Engrossed Narrative Statements of Facts leaves an undisputed conclusion that the plaintiff in this action filed suit with the consent of the assignee, and by virtue of the law stated in the cited cases it appears that the judgment of the trial court should be reversed.

Although the following is not to be construed as a basis on which this case is to be reversed, it may be noted in passing that there is evidence in the case which might be construed as evidence of an assignment, for example the evidence of what Mathis did prior to taking the note and contract to his attorney, together with the evidence of the physical delivery of the note to the attorney.

It is therefore ordered that the Judgment of the Trial Court is reversed, and the cause is remanded from the Appellate Department of the Superior Court to the Municipal Court of the Fresno Judicial District for a new trial.

SHEPARD, P. J., and CONLEY, J., concur.

114 Cal.App.2d Supp. 848

MASTROFINI v. SWANSON.

No. 6.

Appellate Department, Superior Court,
Fresno County, California.
Nov. 21, 1952.

Action for money had and received by defendant for use and benefit of plaintiff on the purchase of used trailer which defendant was to buy from third person and sell to plaintiff, or by defendant as agent for plaintiff in connection with the proposed purchase of trailer. The Municipal Court of the Judicial District, County of Fresno, Cecil E. Edgar, J., entered judgment in favor of plaintiff and defendant appealed. The Superior Court in and for the County of Fresno, Appellate Department, Conley, J., held that there was substantial evidence supporting judgment of trial court to effect that plaintiff contracted directly with defendant for sale of trailer by defendant to plaintiff.

Judgment affirmed.

1. Appeal and Error 🔑931(3)

It must be assumed, when findings are waived, that all issues necessary to decision under the pleadings and evidence were resolved by trial court in favor of respondent. Code Civ.Proc. § 632.

2. Courts 🔑190(8)

The consideration of an appeal from the Municipal Court by the Appellate Department of the Superior Court requires an application of the same rules that control appeals from the Superior Court to the Supreme Court and the District Courts of Appeal.

3. Appeal and Error 🔑989, 994(1), 1011(1), 1012(1)

An appellate court may not weigh conflicting evidence, determine credibility of witnesses or decide on which side evidence preponderates, and when appeal is based wholly on questions of fact, its duty begins and ends with determination that, irrespective of conflicts, evidence supporting findings, if any, and judgment of trial court, is sufficient as matter of law.

4. Appeal and Error 🔑989, 1010(1)

When question raised on appeal is whether evidence supports judgment, only evidence for respondent is material and if it substantially supports the judgment, affirmance must follow.

5. Appeal and Error 🔑931(1), 996

When question raised on appeal is whether evidence supports judgment, the evidence must be viewed in the light most favorable to the respondent, and respondent is entitled to benefit of all reasonable inferences in his favor.

6. Principal and Agent 🔑14(2)

In action for money allegedly had and received by defendant on a trailer used to be purchased from third person and resold to plaintiff, but which defendant claimed he received as agent for disclosed principal, fact that the money was credited to third person in connection with exchange of his trailer for a new trailer purchased from defendant was not binding upon plaintiff on question of whether defendant was seller, or was agent for disclosed principal.

7. Principal and Agent 🔑23(5)

In action for money allegedly had and received by defendant as part payment on used trailer, substantial evidence supported judgment to effect that plaintiff contracted directly with defendant for sale of trailer by defendant to plaintiff, and not, as defendant contended, that he was agent for disclosed principal.

8. Money Received 🔑1

The common count for money had and received is a correct form of pleading in cases where one person has in his possession money which belongs to, or ought to be paid over to, another.

Wild, Carlson & Reeve, Fresno, for appellant.

Harold Parichan, Fresno, for respondent.

CONLEY, Judge.

Defendant, a dealer in automotive equipment, appeals from a judgment against him for $700; that sum was the amount deposited with him by plaintiff in connection with the uncompleted purchase of a trailer, then owned by one, Remy, who is not a party to the action. Appellant urges as his sole point on appeal that the evidence shows he was the agent for Remy, that he paid over the money to his disclosed principal, and that recovery, if any, must be against Remy, as principal and not against him.

[1] In the first cause of action in the complaint, plaintiff sues defendant for $700 as money had and received by him for the use and benefit of plaintiff; in the second cause of action it is alleged that the defendant received the $700, as agent for the plaintiff, in connection with the proposed purchase of the trailer. Findings of fact were waived, Code of Civil Procedure, Section 632, and, thus, the exact basis upon which the case was decided for the plaintiff does not appear in the record; adequate proof under either theory would be sufficient as it must be assumed, when findings are waived, that all issues necessary to decision under the pleadings and the evidence were resolved by the trial court in favor of respondent. U Drive & Tour. Ltd. v. System Auto Parts, Ltd., 28 Cal.App.2d Supp. 782, 786, 71 P.2d 354.

[2] The consideration of an appeal from the Municipal Court by the Appellate Department of the Superior Court requires an application of the same rules that control appeals from the Superior Court to the Supreme Court and the District Courts of Appeal.

[3, 4] An appellate court has no disposition or power to weigh conflicting evidence, to determine the credibility of the witnesses or to decide on which side the evidence preponderates. When an appeal is based wholly on questions of fact, the duty of the court begins and ends with its determination that, irrespective of conflicts, the evidence supporting the findings, if any, and the judgment of the trial court, is sufficient as a matter of law. In re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384. When the question raised on appeal is whether the evidence supports the judgment, the character of the evidence favoring appellant is of no consequence; only the evidence for the respondent is material, and if it substantially supports the judgment affirmance must follow. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Webster v. Board of Dental Examiners, 17 Cal.2d 534, 539, 110 P.2d 992; Continental Insurance Company v. Pacific Greyhound Lines, 43 Cal.App.2d Supp. 877, 880, 111 P.2d 37.

[5] It is also elementary that the evidence in such circumstances must be viewed in the light most favorable to the respondent, and that the respondent is entitled to the benefit of all reasonable inferences in his favor. In re Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424; Hamilton v. Pacific Electric R. Co., 12 Cal.2d 598, 86 P.2d 829.

The theories of the appellant and the respondent sharply conflict with respect to what should be the correct deduction from the evidence. In accordance with his theory, appellant claims that he was merely the agent for a disclosed principal; that pursuant to respondent's directions he credited the $700 to Remy, and that, consequently, Remy must be held responsible for the deposit. If appellant's evidence in support of his theory had been accepted by the trial court and judgment had been entered accordingly, the contention made by appellant would be upheld. Bogart v. Crosby, 80 Cal. 195, 22 P. 84; Zumwalt v. Schwarz, 112 Cal.App. 734, 736, 297 P. 608. But, applying the rules above mentioned, we must, on this appeal, inquire whether there is substantial evidence to support the judgment of the trial court contrary to appellant's theory and in favor of the respondent. If the answer is in the affirmative the judgment must be upheld.

The plaintiff and respondent, Gilbert Mastrofini, testified that in the early part of the summer of 1948 he talked with the defendant and appellant, C. S. Swanson, a dealer in automotive equipment, at the latter's shop in Fresno County. He told him that he wished to buy a three-axle trailer of a certain description, that he would trade in a small trailer which he then owned, and that he would need additional financing on the larger trailer; Swanson said that he had available a trailer of the general description desired by plaintiff at a price of around $2,300 and Mastrofini fixed the price of his own trailer at "around $800". A short time later Swanson called Mastrofini on the telephone, saying that he had found a prospective purchaser for plaintiff's trailer at a $700 figure, and that if the plaintiff were willing to sell for that amount he would drop his price on the trailer Mastrofini wished to buy to $2,250; the two agreed on the reduced figures and later Swanson sent one, Roberts, from Sanger to Madera, who purchased the Mastrofini trailer and gave him a check for $700. The next day Swanson came to Madera and Mastrofini endorsed the $700 check and delivered it to him; "I gave it to him as a deposit on this trailer, with the understanding that the trailer would be as he explained it to me, and he would do the financing on it"; Swanson agreed to mail Mastrofini a receipt for the deposit. At the same meeting Swanson stated to Mastrofini that he planned to acquire the trailer which Mastrofini desired to buy through the sale of a new van to the owner of the trailer which Mastrofini wished to secure, but that Swanson could not take the trailer on trade "until he had sold it to me; he would have to have the deal made with me before he took it in from the other party, Mr. Remy".

At that time Mastrofini had not seen the trailer which he proposed to buy, but later he went to Fresno, saw the vehicle and expressed satisfaction with it. However, Swanson then told him that he could not finance the purchase and suggested that Mastrofini attempt to make arrangements with the First National Bank of Madera for financing. The bank refused to finance the purchase, so he called Swanson, told him he hadn't been able to finance the deal and asked for the return of the $700 deposit; "at that time Mr. Swanson told me he didn't have my deposit, and he didn't have a thing to do with it, and couldn't return it, couldn't do a thing for me".

The respondent further testified on cross-examination as follows:

> "Q. * * * and when you gave this check to Mr. Swanson you told him that this was a deposit on a trailer you were buying from him? A. Yes.
>
> "Q. And did you also state that you wanted the deal financed? A. Yes."

The witness positively denied that he ever asked Swanson to give the check to Remy.

Mastrofini further testified that Swanson told him that he was selling Remy a van; that Remy owned the trailer, "and he couldn't take this trailer in from Mr. Remy until he could sell it to me" or to someone else. The respondent denied that he ever contracted to purchase the trailer from Remy or that he had "dealings with Mr. Remy in regard to the purchase of any equipment," or that "he ever contemplated purchasing any equipment directly from Mr. Remy". Mastrofini reiterated that the $700 was delivered "as a deposit with Mr. Swanson * * * on this trailer", the trailer Swanson "was taking in from Mr. Remy".

[6] The record shows that Swanson did sell a new van to Remy, and that in connection with that sale Swanson gave Remy credit for the $700. If, as testified by Mastrofini, the $700 was deposited with Swanson for the purchase by plaintiff from defendant of the trailer, the transaction by which Swanson credited the $700 to Remy would not be binding upon Mastrofini.

[7] There is, thus, substantial evidence supporting the judgment of the trial court to the effect that plaintiff contracted directly with defendant for the sale of the trailer by defendant to plaintiff; it is, therefore, needless to review the record further.

[8] The common count for money had and received is a correct form of pleading in cases such as this where one person has in his possession money which belongs to, or ought to be paid over to another. Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; 5 Cal.Jur.2d 556, 559.

Inasmuch as the judgment is supported by substantial evidence, even though such evidence conflicts with testimony adduced by the appellant, the judgment must be, and it is, affirmed.

SHEPARD, P. J., and DE WOLF, J., concur.

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114 Cal.App.2d Supp. 831

PEOPLE v. PAKCHOIAN.

No. 2.

Appellate Department, Superior Court,
Fresno County, California.
Aug. 11, 1952.

Defendant was convicted of violation of Vehicle Code. The Municipal Court, Fresno, California, Leonard I. Meyers, J., entered judgment of conviction, and defendant appealed. The Superior Court, County of Fresno, Appellate Department, Shepard, J., held that a four wheel scraper or carry-all which is designed for automatic pickup and moving of free earth without regard to place of removal, was a vehicle in which a person could be propelled, moved or drawn upon a public highway, and was not exempt from registration as an implement of husbandry.

Affirmed.

1. Automobiles 🔑37, 326

A four-wheel scraper or carry-all which was designed for automatic pick-up and moving of free earth without regard to place of removal, was a "vehicle" in which a person could be propelled, moved or drawn upon a public highway, and was not exempt from registration as an implement of husbandry, although only used for farm leveling and scraping, and owner, who had permitted unregistered vehicle to be moved on highway, was guilty of misdemeanor. Vehicle Code, §§ 31, 32, 45, 140, 141, 142(c).

See publication Words and Phrases, for other judicial constructions and definitions of "Vehicle".

2. Witnesses 🔑268(1)

In prosecution for driving on a public highway, without proper registration, a vehicle required by state law to be registered, court properly permitted cross-examination on subject of purposes for which equipment in question could be used. Vehicle Code, §§ 31, 32, 36, 45, 140, 141, 142(c).

E. Clarke Savory, District Atty., Fresno, for the People.

N. Lindsay South and James Janjigian, Fresno, for Pakchoian.

SHEPARD, Presiding Judge.

This matter comes before the Court on defendant's appeal from a judgment of conviction of violation of Section 140 of the Vehicle Code of the State of California in driving on a public highway, without proper registration, a vehicle required by state law to be registered.

The facts shown by the statement on appeal are that defendant, at the time and place alleged in the complaint, caused an unregistered, four-wheel Le Tourneau "scraper or carry-all" to be towed on a public highway. This "scraper or carry-all" is designed for automatic pickup and moving of free earth without regard to where the earth may be or whether the purpose be farm, leveling highways, building sites or airports or other industrial uses, but defendant testified without contradiction that he actually used the same only for farm leveling and scraping.

The appellant contends that this "scraper or carry-all" is not a vehicle within the meaning of Sections 31 and 32 of the Vehicle Code, or Section 140 of the

Vehicle Code; that it is specifically exempted by Section 142(c) of the Vehicle Code; that there is no requirement under Section 140 for registration; that the complaint fails to state facts sufficient to constitute a criminal offense under Section 140; that the Court erred in permitting questions as to how the subject equipment could be used; and that the evidence is insufficient to support the judgment.

Vehicle Code Section 31 provides that a vehicle is a device in, upon, or by which any person or property is, or may be propelled, moved or drawn upon a public highway.

Vehicle Code Section 140 makes the moving of an unregistered vehicle, of a type required to be registered, a misdemeanor.

Vehicle Code Section 36 describes a trailer as a vehicle designed for carrying persons or property on its own structure to be drawn by another vehicle with none of the trailer's weight resting on the propelling vehicle.

Vehicle Code Section 141 provides that any trailer or semitrailer (among other vehicles) must be registered subject to the exemptions contained in Section 142.

Vehicle Code Section 142(c) exempts from registration any implement of husbandry.

Vehicle Code Section 45 provides that an implement of husbandry is a vehicle which is designed *exclusively* for agricultural operations. (Emphasis ours.)

Vehicle Code Section 372.3 defines "carry-all" and uses the trade name "Le Tourneau" as one of the types recognized and specifically excludes "carry-alls" from the weight fees required by the Vehicle Code when used exclusively for agricultural purposes. This section refers to affidavits accompanying applications for registration where the exemption from weight fees is sought and provides that after registration if it is desired to use the "carry-all" for other purposes, weight fees must then be paid.

Counsel have not referred us to, nor have we been able to discover, any decisions of other Courts of California which pass on the subject.

The Attorney General reviewed the subject in 1942 and came to the conclusion under the law as it then read that a "carry-all" is a vehicle, should be classified as a trailer or semitrailer, according to type, and is required to be registered when operated on a public highway.

There have been some slight changes in the law since the Attorney General's ruling, but in our opinion they have strengthened, rather than weakened, the opinion which he then gave.

[1, 2] From an examination of all the evidence in this case and of the statutes above noted in other parts of the Vehicle Code, it is our opinion that this "scraper or carry-all" is a vehicle within the meaning of the Vehicle Code of Sections 31, 32 and 140; that it is not designed *exclusively* for agricultural purposes; is not an "implement of husbandry" within the meaning of Sections 45 and 142(c) of the Vehicle Code; and is, therefore, not exempted from registration by Section 142(c) of the Vehicle Code; that for an owner to knowingly permit such an unregistered vehicle to be driven or moved upon any highway of the State of California is a misdemeanor under Section 140 of the Vehicle Code; that the complaint specifically states a criminal offense under Vehicle Code Section 140; that the Court did not err in permitting cross-examination on the subject of the purposes for which the equipment could be used; that the evidence is amply sufficient to support the judgment of conviction as a matter of law.

The judgment is affirmed.

CONLEY and DE WOLF, JJ., concur.

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